Supreme Court, U. S.
FILED
SEP 25 1974
MICHAEL RODAK, JR., CLERK

Nos. 74-165, 74-167 and 74-168

IN THE

Supreme Court of the United States

October Term, 1974

UNITED STATES OF AMERICA, et al.,
Appellants in No. 74-168,

v.

CONNECTICUT GENERAL INSURANCE CORPORATION, PENN CENTRAL COMPANY, et al.,
Appellees.

UNITED STATES RAILWAY ASSOCIATION,
Appellant in No. 74-167,

v.

CONNECTICUT GENERAL INSURANCE CORPORATION, PENN CENTRAL COMPANY, et al.,
Appellees.

ROBERT W. BLANCHETTE, RICHARD C. BOND AND JOHN H. McARTHUR AS TRUSTEE OF THE PROPERTY OF PENN CENTRAL TRANSPORTATION COMPANY, DEBTOR,
Appellants in No. 74-165,

v.

CONNECTICUT GENERAL INSURANCE CORPORATION, PENN CENTRAL COMPANY, et al.,
Appellees.

On Appeal From the United States District Court for the Eastern District of Pennsylvania.

BRIEF FOR APPELLEE PENN CENTRAL COMPANY.

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QUESTIONS PRESENTED.

1. Whether the Court abused its discretion in finding that Section 304(f) of the Regional Rail Reorganization Act of 1933 which mandates continuing operations of the Penn Central rail operations pending implementation of a Final System Plan effects a taking of plaintiff's property without payment of just compensation in violation of the Fifth Amendment of the United States Constitution when concededly there is no reasonable likelihood of a successful reorganization.

2. Whether, despite the language of the Act and the legislative history surrounding its enactment evidencing Congress' determination that no Court of Claims remedy was to be available, a Court of Claims action will lie to recover just compensation for the government's interim taking of plaintiff's property mandated by Section 304(f) of the Act and whether the mere possibility that any such action could be brought would render reversibly erroneous the decision below.

3. Whether the Order of the Court prohibiting certification of the Final System Plan should be sustained for the reason that the final conveyances of rail property mandated by the Act result in a taking of plaintiff's property without the payment of just compensation required by the Fifth Amendment of the Constitution.

4. Whether the Order of the Court prohibiting certification of the Final System Plan should be sustained for the reason that the Act is a non-uniform law on the subject of bankruptcies and therefore violates Article I, Section 8, Clause 4 of the Constitution.

STATEMENT OF THE CASE.

Penn Central Company is the parent holding company of Penn Central Transportation Company owning 100% of the Transportation Company's stock.[1] The Transportation Company is the successor corporation to the Pennsylvania Railroad Company and the New York Central Railroad Company whose merger became effective on February 1, 1968. Penn Central Company is also an unsecured creditor of the Transportation Company in the approximate amount of $41.8 million.[2]

The stock of Penn Central Company is owned by over 150,000 members of the public and the Company has represented the interests of these public shareholders throughout the reorganization proceedings of the Transportation Company beginning on June 21, 1970. Penn Central Company appeared before the Interstate Commerce Commission during the summer of 1973 and presented its Plan of Reorganization for the railroad while opposing the Plan submitted by the Trustees of the Transportation Company. The Interstate Commerce Commission in its Report of September 28, 1973 rejected all plans submitted to it.

On January 2, 1974, the Regional Rail Reorganization Act (the "Act") became law. Penn Central Company thereupon filed on January 29, 1974, an action in the United States District Court for the District of Columbia attacking the constitutionality of the Act on the grounds *inter alia* that the Act results in a taking of property without the adequate compensation required by the Fifth Amendment,

1. See Stipulation of Plaintiff and Defendants as to Factual Matters, Joint Appendix p. 370. Hereinafter, the Joint Appendix will be referred to as J. A.

2. See Stipulation of Plaintiff and Defendants as to Factual Matters (J. A. p. 370).

and that the Act was non-uniform in violation of Article I, Section 8, Clause 4.[3]

The Penn Central Company action was transferred to the Eastern District of Pennsylvania and consolidated with similar actions brought by the New Haven Trustees and certain secured creditors: *Smith v. United States, et al.*, and *Connecticut General Insurance Corporation, et al. v. United States Railway Association, et al.* A three-judge constitutional court consisting of Circuit Judge Ruggero J. Aldisert and District Judges John P. Fullam and Louis C. Bechtle was convened to hear the cases. All plaintiffs filed motions for summary judgment seeking an injunction restraining enforcement of various portions of the Act and a declaratory judgment that the Act or portions thereof violate the Constitution.

On June 25, 1974, the three-judge court entered an opinion and order enjoining the United States Railway Association ("USRA") from certifying a Final System Plan pursuant to Section 209(e) of the Act, all defendants from taking any action to enforce Section 304(f) of the Act relating to abandonment, cessation or reduction of rail service, and all parties from enforcing that portion of Section 207(b) of the Act requiring dismissal of pending reorganization proceedings under Section 77 of the Bankruptcy Act. The court also entered a declaratory judgment that § 303 of the Act is null and void in that it fails to provide compensation for interim erosion pending final implementation of the Final System Plan and that § 304(f) of the Act is null and void as violative of the Fifth Amendment to the Constitution insofar as it requires continued operation of rail services at a loss. The court below also declared a portion of § 207(b) of the Act null and void as violative of Article I, Section 8, Clause 4 of the Constitu-

3. *Penn Central Company v. Brinegar, et al.*, Complaint at J. A. pp. 341-349.

tion in that the Act is not uniform geographically throughout the United States.

All defendants, including the intervenor defendants Penn Central Trustees appealed the three-judge court order to this Court (Appeals docketed as 74-165, 74-167 and 74-168). The New Haven Trustee, a plaintiff below, cross-appealed to this Court from those portions of the Order denying summary judgment (docketed as 74-166).

SUMMARY OF ARGUMENT.

Penn Central Company, appellee in appeals 74-165, 74-167 and 74-168, contends that the Order of the three-judge court prohibiting certification of the Final System Plan and Section 304(f) should be sustained. The Court was correct in finding that the Act requires continued operations of Penn Central Transportation Company pending implementation of the Final System Plan and that no compensation is provided the estate or its creditors and shareholders for such interim erosion in violation of the Fifth Amendment to the Constitution. The Court was correct in finding that the Tucker Act cannot be used to save the constitutionality of the Act. The Court was also correct in holding that the Act was not geographically uniform.

Penn Central Company also contends that the order of the Court enjoining certification of the Final System Plan and Section 304(f) can and should be sustained for the additional reasons that the final conveyance of rail properties from the Transportation Company to Conrail is not adequately compensated for as required by the Fifth Amendment, and that, because the Act is not geographically uniform, it violates Article I, Section 8, Clause 4 of the Constitution.

I.

The Court was correct in concluding that the Rail Act requires continued operation of the Penn Central Transportation Company's rail facilities during the period of formulation and approval of the Final System Plan pursuant to Sections 206, 207 and 208 of the Act. Section 304(f) mandates that no railroad may discontinue service or abandon any lines except in accordance with the terms of the Act unless authorized to do so by USRA and there is no reasonable opposition by any affected region or locale.

The Court was also correct in concluding that there is no adequate compensation provided for in the Act for this interim taking. Section 213 limits the authority of the Secretary of Transportation to authorize funds for rail service during the implementation period to $85 million. This amount is clearly insufficient to protect the Penn Central Transportation Company and its creditors and shareholders during the implementation period and indeed even this sum has not yet been appropriated. Section 215 provides funds merely for acquisition, maintenance or improvement of rail properties and relieves Conrail from any obligation to compensate a railroad for that portion of the value of the transferred properties which is attributable to such acquisition, maintenance or improvement.

The law is clear that a railroad cannot be constitutionally compelled to continue its operations when such operations result in continuing losses and there is no reasonable prospect of a successful reorganization. The facts are clear that the Penn Central estate has suffered, is currently suffering and will continue to suffer staggering losses. The reorganization court has found that there is no possibility of an income-based reorganization pursuant to Section 77 of the Bankruptcy Act within a reasonable time. Conrail, the corporation established by the Act will not be significantly different from Penn Central. No evidence whatsoever has been introduced either in the court below or in the reorganization court that Conrail has any reasonable likelihood of success. On the other hand, significant evidence was introduced that Conrail is doomed to failure.

Since the Act takes plaintiff's property during the interim period before the Final System Plan is approved, since the Act provides no just and adequate compensation for such taking and since the Act provides no reasonable likelihood of a successful reorganization, the Act violates the Fifth Amendment to the Constitution and is invalid.

II.

The decision of the lower court enjoining certification of a Final System Plan can be sustained for the additional reason that the Act's provisions relating to the final conveyancing of rail properties effects a taking of plaintiff's property without just compensation in violation of the Fifth Amendment.

This issue is clearly ripe for determination. The Act is comprised of a series of steps which lead inexorably to the conveyance of rail properties. Plaintiff has no choice or options with respect to the transfer and valuation of the properties. If plaintiff's claims as to the final taking are not decided at this time, there will never again be a meaningful time in which they can be decided.

There is no question that the compulsory conveyance features of the Act result in a taking of plaintiff's property. The Act violates the Fifth Amendment in that it limits the amount to be paid for the properties to $500 million, an amount clearly below the value of the Penn Central assets let alone the additional value of the other affected railroads. The Act also violates the Fifth Amendment in that it does not provide for payment in legal tender and it removes from the judiciary their constitutional function to determine compensation to be paid and places it in Congress.

III.

The court's decision that a Tucker Act remedy is not available is correct. The legislative history, both before and after passage of the Act, is clear that Congress considered the issue of a Court of Claims suit for compensation and squarely reflected it. Congress intended the provisions of the Act to provide the only compensation available for the taking of railroad property.

Indeed, a Court of Claims suit would not provide an adequate remedy. That court can not satisfy the objections of Penn Central Company and the other plaintiffs to the Act. In addition, of course, even were a judgment to be recovered in the Court of Claims, there is no reasonable likelihood that Congress will appropriate money for it. In fact, there is every likelihood that it will not.

The most that can be seriously contended by defendants is that the availability of a Tucker Act suit is extremely uncertain. This extreme uncertainty itself is enough to render the Act unconstitutional.

IV.

The decision of the lower court enjoining certification of a Final System Plan can be sustained for the additional reason that the Act is a non-uniform law on the subject of bankruptcies and therefore violates Article I, Section 8, Clause 4 of the Constitution.

The Court was clearly correct in holding that the Act failed the Constitution's uniformity test. It applies only to certain railroads in certain specified portions of the United States. The Act is clearly a law on the subject of bankruptcies. It supplements Section 77 of the bankruptcy laws and overrides it in numerous instances.

The Act cannot be upheld under the Commerce Clause. Enacted under Congress' bankruptcy power, the Act must satisfy that clause's provisions which more specifically apply.

Even if the Commerce Clause does apply to the Act, numerous Sections other than 207(b) are clearly based solely on Congress' bankruptcy power and must therefore be declared unconstitutional for being geographically non-uniform.

ARGUMENT.

I. The Interim Erosion of Penn Central's Assets Caused by the Operation of § 304(f) of the Act Violates Plaintiff's Fifth Amendment Rights.

A. The Legal Background of the Fifth Amendment as It Affects Property Rights and Its Application by the Court Below.

The Fifth Amendment to the Constitution requires that no "private property be taken for public use, without just compensation."

In *Pennsylvania Coal Company v. Mahon*, 260 U. S. 393 (1922), the problem of determining when governmental regulation ended and a taking began was discussed by Mr. Justice Holmes:

> "The protection of private property in the Fifth Amendment presupposes that it is wanted for public use but provides that it shall not be taken for such use without compensation. . . . The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. . . . We are in danger of forgetting that a strong public desire to improve the public condition was not enough to warrant achieving a desire by a shorter cut than the constitutional way of paying for the change." *Id.* at 415-16.

The Court in *Mahon* further stated, with regard to a statute which purported to regulate the property interest in issue, that "[w]e assume, of course, that the statute was passed upon the conviction that an exigency existed that would warrant it, and we assume that an exigency exists

that would warrant the exercise of eminent domain. But the question at bottom is upon whom the loss of the changes desired should fall." *Id.* at 416. The *Mahon* Court thereby recognized that the provisions of the Fifth Amendment must be respected and complied with regardless of the demands of public necessity.

A "taking" results if there is an intent on the part of the government or of a branch of government to control, confiscate, employ or gain dominion over the property in question and the property is acquired for public use with resultant interference with individual property rights. *Sayre v. United States*, 282 F. Supp. 175 (N. D. Ohio 1967); *United States v. Willow River Power Co.*, 324 U. S. 499, 502-503 (1945). Such governmental intent can be inferred. *United States v. Causby*, 328 U. S. 256 (1946); *Portsmouth Harbor L. & H. Company v. United States*, 260 U. S. 327 (1922); *United States v. Lee*, 106 U. S. 196 (1882). In *Eyherabide v. United States*, 345 F. 2d 565 (Ct. of Cl. 1965), the Court citing *Causby*, *Mahon* and their progeny, stated that "federal law recognizes that, although there may be no official intention to acquire any property interest, certain governmental actions entail such an actual invasion of private property rights that a constitutional taking must be implied." *Id.* at 506. The property rights protected by the Fifth Amendment have been described by the federal courts. For example, in *United States v. Finn*, 127 F. Supp. 158, 167 (D. Cal. 1954), *modified on other grounds*, 239 F. 2d 679 (9th Cir. 1956), the Court said:

> "Property . . . denote[s] the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it. . . . The constitutional provision is addressed to every sort of interest the citizen may possess."

Similarly, in *Pennsylvania Coal Company v. Mahon*, *supra*, 260 U. S. at 414-415, the Court stated:

> "What makes the right to mine coal valuable is that it can be exercised for profit. To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it."

In *United States v. Causby*, *supra*, 328 U. S. at 267, it was recognized that "[I]t is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines whether it is a taking." Similarly, in *United States v. General Motors Corp.*, 323 U. S. 373, 378 (1945), the Court stated that it is "the deprivation of the former owner rather than the accretion of a right or interest to the sovereign [which] constitutes the taking. Governmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking." *See Eyerabide v. United States*, *supra*, 345 F. 2d at 567; *Pennsylvania Coal Co. v. Mahon*, *supra*, 260 U. S. at 413. Interference with useful possession is itself sufficient to constitute a taking, so long as it can be assumed that the United States has acquired a definite interest in the property, be that interest permanent or temporary *e.g.*, *Eyerabide v. United States*, *supra*, 345 F. 2d at 567.

Once it has been determined that a taking has occurred, "assurance of payment in cash or equivalent is a constitutional requirement." *Almota Farmers Elev. & Whse. Co. v. United States*, 409 U. S. 470 (1973); *United States v. Reynolds*, 397 U. S. 14 (1970); *United States v. Miller*, 317 U. S. 369 (1943); *Olsen v. United States*, 292 U. S. 246 (1934); *Van Horne's Lessee v. Dorrance*, 2 Dale. 304 (Cir.

Ct. Pa. Dist. 1795); Nicholas, *Eminent Domain*, §8-2 (3d Rev. ed. 1970).

It is against this background that the three-judge Court found, as a matter of law, that §304(f) of the Act affects a taking of the private property of the Estate, its creditors and shareholders for public use by its requirement of continued rail operations during the period before a Final System Plan is developed resulting in interim erosion of Penn Central Transportation Company's assets, that the Act does not provide compensation for the taking, and that, therefore, Congress cannot constitutionally prevent cessation of rail operations under the terms of the Act.

In discussing the ripeness of the interim erosion issue, the court first commented upon the history of Penn Central Transportation Company's rail operations:

> ". . . During the period that began June 21, 1970, until December 31, 1973, Penn Central sustained ordinary net losses in an amount which approximates $851,000,000.00.
>
> "It is also stipulated that for the two months ended February 28, 1974, Penn Central had a deficit in net railway operating income, a deficit in total income, a deficit in income available for fixed charges and deficit net income, as those items are determined in accordance with accounting regulations of the Interstate Commerce Commission. As previously stated, the Penn Central reorganization court has ruled that the railroad is not reorganizable on an income basis within a reasonable time under Section 77 of the Bankruptcy Act. Opinion of three-judge court (J. A. pp. 36-37).[4, 5]

4. See Opinion of three-judge court, J. A. at pp. 36-40 for more details on erosion issue.

5. See Stipulation of Plaintiff and Defendants as to Factual Matters (J. A. pp. 370-375).

The Trustees had pointed out early in 1973 that, as a result of claims against the Penn Central estate, there was little probability that the railroad could win the battle against the continuing erosion of its assets:

> ". . . the value of the estate has already been substantially eroded and the Trustees are presently unable to prevent continuing erosion. . . .
>
> "There is, simply, not enough cash to cope with continuing claims and to embark upon the capital improvement programs which would permit a continuation of service improvements. Not only is the ability to preserve earning power jeopardized, but Penn Central's essential public services cannot be sustained on this basis." Trustees' Interim Report of January 1, 1973, p. 4 (Doc. No. 4911), cited in *Connecticut General*, *supra* (J. A. p. 39).

The court then reviewed earlier judicial decisions which had acknowledged that forcing the railroad to continue operating at staggering losses offends the Constitution:

> "The Court of Appeals for the Third Circuit suggests: 'If, as some of the reports filed by the trustees suggest, it is already clear that such a reorganization is not feasible, then *this reorganization is already at the point where the erosion of the estate in deficit operations must cease* and a liquidation alternative must be considered if the secured creditors or other interested parties insist upon such consideration.
>
> [*In the Matter of Penn Central Transportation Co., Debtor*, (Columbus Option Cases), 494 F. 2d 270, 283 (3d Cir. 1974)]
>
> "Over a year ago the Section 77 Reorganization Court warned: '1. *Erosion*. While the precise calculations have not been fully developed, the record justifies the

conclusion that post-reorganization deferrals and unpaid administration claims have already eroded the Debtor's estate to the extent of about $500 million. Whether the constitutional limit has been exceeded depends primarily upon how the remaining assets are to valued; and this in turn may well depend upon how those assets are to be used at the conclusion of this reorganization. Under any view of the matter, it seems clear that *the point of unconstitutionality is fast approaching, if it has not already arrived.* . . . On the basis of the record to date, it appears highly doubtful that the Debtor could properly be permitted to continue to operate on its present basis beyond October 1, 1973.' *In re Penn Central Transportation Company,* 355 F. Supp. 1343, 1344, 1346 (E. D. Pa. 1973)." *Connecticut General, supra,* (J. A. pp. 39-40). [footnotes omitted] [Emphasis supplied]

The three-judge court then concluded that the issue of interim erosion was indeed ripe for judicial determination:

"Cognizant of massive operational losses of $851,000,000 during the present reorganization proceedings, and cognizant also that unsecured creditor as well as secured creditor interests are squarely before this court, we are persuaded that a significant possibility exists that a point of erosion either has been or may soon be reached so that it can be said that plaintiffs' contention of interim unconstitutional taking by continued loss operations is ripe for adjudication. Having determined that there is a controversy ripe for adjudication, we now examine the merits of plaintiffs' contention." *Id.* (J. A. p. 40).

The Court then recognized that the Act makes no provision for any compensation for interim erosion, noting that:

"[t]he defendants acknowledge that if a point is reached where continued loss operations during the interim amount to an unconstitutional taking, the Act does not explicitly provide for the payment of just compensation." *Id.* (J. A. pp. 40-41)

The Court then proceeded to review the legal authority relating to taking, and finally concluded that the continued interim erosion forced by the Act results in a taking, and that the absence of any provision for just compensation renders the taking unconstitutional:

"Accordingly, we hold that Section 304(f), in requiring mandatory interim operations without providing a legal remedy to furnish fair and just compensation for *an erosion of property beyond constitutional limits,* offends the Fifth Amendment." (J. A. p. 53). [Emphasis supplied]

The lower court's finding of a taking must be given great weight by this Court. It can be reversed only upon a showing that the court abused its judicial discretion. In *Continental Illinois Nat. Bank & T. Co. v. Chicago, Rock Island & Pacific Ry. Co.,* 294 U. S. 648 (1935), appellant bond holders attempted to overturn the lower court's judgment enjoining them from foreclosing on their liens against the railroad. The Supreme Court refused to reverse the District Court's decision. The government defendants cited that decision to the three-judge court below in their brief at pp. 41-42, including language with which plaintiff fully agrees:

"* * * A claim that injurious consequences will result to the pledgee or the Mortgagee * * * presents a question addressed not to the power of the court but to its discretion—a matter not subject to the interference of

an appellate court unless such discretion be improvidently exercised." *Id.* at 677.

Plaintiff submits that the lower court's judgment that the Act results in a taking is a correct decision and that the court's discretion was indeed providently exercised. Consequently, this Court should affirm.

B. The Act Unconstitutionally Takes Plaintiff's Property Without Any Provision for Just Compensation.

The theory upon which the government bases its defense of § 304(f) of the Act is essentially that the public interest in preserving rail service in the Northeast is so paramount that stockholders and creditors of the railroad can be forced to shoulder the burden of providing that service to the public.[6] The lower court properly rejected that argument.

6. The government also suggests that any decision as to the existence of a taking is premature unless facts have been developed by which a plaintiff can show he would enjoy a better financial position if the Act did not operate to restrain his freedom. This newly concocted theory has no precedent in law. The Fifth Amendment protects not only the right to profit from one's property, but also the right to dispose of the property, regardless of the risks and uncertainty involved in any choice of method for disposition. *See, e.g., United States v. Finn, supra*, 127 F. Supp. 157, 167 (S. D. Cal. 1954).

Even the defendant Secretary of Transportation, has recognized that the Congressional foreclosure of choice of disposition of property amounts to a taking in this instance:

> "The essence of a condemnation is to deprive a property owner by operation of law of his options to do anything with his property but sell it to the government or a designated public utility. While it may well be most advantageous for a railroad in reorganization to reorganize by conveying its assets to the Corporation pursuant to this bill (H. R. 9142, the predecessor of the Act), *if all other options available to the railroad are foreclosed by this statute, then what you have is, in legal effect, a condemnation.*" Letter from Claude S. Brinegar, Secretary of Transportation, to Senators Magnuson and Cotton, reproduced in S. Rep. 93-601, 93d Cong., 1st Sess. 131-2 (1973). (Emphasis added)

As early as 1920, Justice Holmes stated for a unanimous Supreme Court the well-established principle that the government cannot force a railroad to operate at a loss. *Brooks-Scanlon Co. v. Railroad Commission of Louisiana*, 251 U. S. 396 (1920):

> ". . . A carrier cannot be compelled to carry on even a branch of business at a loss, much less the whole business of its carriage. On this point it is enough to refer to Northern Pacific Ry. Co. v. North Dakota, 236 U. S. 585, 595, 599, 600, 604, Illand Norfolk & Western Ry. Co. v. West Virginia, 236 U. S. 605, 609, 614. . . . It is true that if a railroad continues to exercise the power conferred upon it by a charter from the State, the State may require it to fulfill an obligation imposed by the charter even though fulfillment in that particular may cause a loss. Missouri Pacific Ry. Co. v. Kansas, 216 U. S. 262, 276, 278. But that special rule is far from throwing any doubt upon a general principle too well established to need further argument here. The plaintiff may be making money from its sawmill and lumber business but it no more can be compelled to spend that than it can be compelled to spend any other money to maintain a railroad for the benefit of others who do not care to pay for its

6. (Cont'd.)

The lower court properly rejected the government's theory. Besides the fact that there is no precedent for such a formula, the government's conception places an impossible burden upon the plaintiffs, requiring them to prove the outcome of their choice of disposition of PCTC's property, a prediction which must necessarily rest upon pure speculation. While plaintiff pointedly rejects the government's comparison theory, if this Court were to decide that the Fifth Amendment does require some sort of relative financial outcome test, then *the burden must be laid on the government* to prove that the continued daily losses forced by the Act creates a better financial atmosphere for the Penn Central's shareholders and creditors than would result from a restoration to them of their right to freely deal with or dispose of their property.

> If the plaintiff be taken to have granted to the public an interest in the use of the railroad it may withdraw its grant by discontinuing the use when that use can be kept up only at a loss. Munn v. Illinois, 94 U. S. 113, 126. The principle is illustrated by the many cases in which the constitutionality of a rate is shown to depend upon whether it yields to the parties concerned a fair return." *Id.* at 399.

In *Brooks-Scanlon*, then, the Supreme Court held it unlawful to force a railroad to maintain a *branch line* as a public service where to so require would result in a loss to the railroad of more than *$1,500 a month*. *Id.* at 397. Here, the government is attempting to force continued operation of an *entire railroad at a loss of well over $15 million a month*. If the situation in *Brooks-Scanlon* constituted a taking, then certainly the 1973 Act must be similarly viewed.

A year after *Brooks-Scanlon*, the Supreme Court again held that compelling deficit rail operations is unlawful. In *Bullock v. State of Florida*, 254 U. S. 513 (1921), the government attempted to prevent an insolvent railroad from dismantling its questions. Once again, Justice Holmes spoke for a unanimous court:

> "Apart from statute or express contract people who have put their money into a railroad are not bound to go on with it at a loss if there is no reasonable prospect of profitable operation in the future. Brooks-Scanlon Co. v. Railroad Commission of Louisiana, 251 U. S. 396, 40 Sup. Ct. 183, 64 L. Ed. 323. No implied contract that they will do so can be elicited from the mere fact that they have accepted a charter from the State and have been allowed to exercise the power of eminent domain. Suppose that a railroad company

> should find that its road was a failure, it could not make the state a party to a proceeding for leave to stop, and whether the state would proceed would be for the state to decide. The only remedy of the company would be to stop, and that it would have a right to do without the consent of the state if the facts were as supposed. Purchasers of the road by foreclosure would have the same right. *Id.* at 520-521.

The fact that a statute is involved in the present situation cannot be read to allow the taking. The legislature does not have the power to contravene the Constitution. Moreover, the railroad, its stockholders and its creditors cannot be said, by virtue of their public charter, to have impliedly accepted a duty to maintain services at their expense for the benefit of the public; only a statute can create that duty, and the statute here is ex post facto. "Without *previous* statute or contract to compel the company to keep on at a loss would be an unconstitutional taking of its property." *Id.* at 521 (Emphasis supplied). Only if the railroad and its investors had expressly agreed to the strictures of the RRRA *before* beginning any rail operations at all could the investors be said to have accepted any such duties.

In 1924 the Supreme Court had to decide an appeal by the State of Texas from a District Court's ruling that the State could not prevent the owner of a railroad from exercising its "right . . . to dismantle and abandon its road." *Railroad Commission of Texas v. Eastern Texas R. Co.*, 264 U. S. 79, 82 (1924). Once again, the Court unanimously recognized that a doctrine of "public necessity" could not be employed to lessen the force of the Fifth Amendment:

> "The usual permissive charter of a railroad company does not give rise to any obligation on the part of the company to operate its road at a loss. No contract

that it will do so can be elicited from the acceptance of the charter or from putting the road in operation. The company, although devoting its property to the use of the public, does not do so irrevocably or absolutely, but on condition that the public shall supply sufficient traffiic on a reasonable rate basis to yield a fair return. And if at any time it develops with reasonable certainty that future operation must be at a loss, the company may discontinue operation and get what it can out of the property by dismantling the road. To compel it to go on at a loss or to give up the salvage value would be to take its property without the just compensation which is a part of due process of law. The controlling principle is the same that is applied in the many cases in which the constitutionality of a rate is held to depend upon whether it yields a fair return. Brooks-Scanlon Co. v. Railroad Commission of Louisiana, 251 U. S. 396, 399, 40 Sup. Ct. 183, 64 L. Ed. 323; Bullock v. Railroad Commission of Florida, 254 U. S. 513, 520, 41 Sup. Ct. 193, 65 L. Ed. 380; State ex rel. v. Jack (C. C.) 113 Fed. 823; Id., 145 Fed. 281, 76 C. C. A. 165; State v. Old Colony Trust Co., 215 Fed. 307, 312, 131 C. C. A. 581, L. R. A. 1915A, 549; Northern Pacific R. R. Co. v. Dustin, 142 U. S. 492, 499, 12 Sup. Ct. 283, 35 L. Ed. 1092; Commonwealth v. Fitchburg R. R. Co., 12 Gray (Mass.) 180, 190; State v. Dodge City, etc., Ry. Co., 53 Kan. 329, 336, 36 Pac. 755, 24 L. R. A. 564.

"So long as the railroad company continues to exercise the privileges conferred by its charter, the state has power to regulate its operations in the interest of the public, and to that end may require it to provide reasonably safe and adequate facilities for serving the public, even though compliance be attended by some pecuniary disadvantage. Atlantic Coast Line R. R. Co. v. North Carolina Railroad Commission, 206 U. S. 1, 26, 27 Sup. Ct. 585, 51 L. Ed. 933, 11 Ann. Cas. 398; Missouri Pacific Ry Co. v. Kansas, 216 U. S. 262, 279, 30 Sup. Ct. 330, 54 L. Ed. 472; Chesapeake & Ohio Ry. Co. v. Public Service Commission, 241 U. S. 603, 607, 37 Sup. Ct. 234, 61 L. Ed. 520. But this rule in no wise militates against the principle that the company may withdraw its property from use by the public when that use can be kept up only at a loss. Brooks-Scanlon Co. v. Railroad Commission of Louisiana, supra." *Railroad Commission of Texas v. Eastern Texas R. Co., supra,* 264 U. S. 85-86.

In addition to *Brooks-Scanlon, Bullock,* and *Eastern Texas, see Louisville Joint Stock Land Bank v. Radford,* 295 U. S. 555 (1935); *In re Third Avenue Transit Corp.,* 198 F. 2d 703 (3d Cir. 1952); *Central Railroad Co. of New Jersey v. Manufacturers Hanover Trust Co.,* 421 F. 2d 604 (3d Cir. 1970), *cert. denied* 398 U. S. 949 (1970); *In the Matter of the Central Railroad Company of New Jersey,* (Bky. No. B401-67, 3d Cir., Aug. 27, 1973).

Those decisions which hold that a railroad cannot be constitutionally compelled to continue its operations when such operations result in continuing losses and there is no reasonable prospect of reorganization are still good law. The Third Circuit made this clear in *In re Penn Central Transportation Company,* 494 F. 2d 270 (3rd Cir. 1974) (*Columbus Options*), when it reviewed *Brooks-Scanlon, Bullock* and *Eastern Texas* and the more recent decisions in the *Penn Central Merger Cases,* 389 U. S. 486 (1968) and the *New Haven Inclusion Cases,* 399 U. S. 392 (1970). The Third Circuit in *Columbus Options* held that where the government had a prior lien on all assets of the debtor,

and where certain assets were to be sold in order to reimburse the debtor's general operating funds rather than to pay off the liens, interests of junior creditors were so compromised that the entire scheme resulted in a taking unless the marshalling rules were applied. Circuit Judge Gibbons disputed the government's contention that this court in the *New Haven Inclusion Cases, supra,* had laid down a new principle of constitutional law:

> "That new principle, they argue, is that secured investors in a railroad enterprise take on obligations in relation to the public which makes it appropriate that they run such a risk of erosion of their investment as is necessary in the public interest in order to preserve railroad service." 494 F. 2d at 279.

After carefully analyzing the factual circumstances of the *New Haven Inclusion Cases,* Judge Gibbons noted that "[t]he constitutionality of the erosion which had taken place . . . was never presented to the court in any proceeding in which it could have passed upon that issue." *Id.* at 282. The Supreme Court's grounds for decision had been narrow, entirely avoiding a ruling on any question of a taking:

> "The *New Haven Inclusion Cases* decide no more than that Penn Central does not have to pay for erosion which took place prior to its purchase of the assets . . . The erosion which took place in the New Haven reorganization did not occur because either the reorganization court or the Supreme Court considered that a new interpretation of the Fifth Amendment was being announced. Rather the reorganization court acting slowly, but with the concurrence of the bondholders, sought a purchaser which would pay creditors what

> *Brooks-Scanlon, Eastern Texas* and *Third Avenue* required. The Supreme Court merely approved the reorganization court's application of settled Fifth Amendment law. Nothing more was presented to it in either of the cases relied on by the government and the trustees. Neither the *Penn Central Merger Cases* nor the *New Haven Inclusion Cases* cast doubt upon the continued viability of the *Third Avenue*[7] and *Jersey Central*[8] rules." 494 F. 2d at 282.

The *Third Avenue* and *Jersey Central* rules as construed in *Columbus Options* require that before the railroad, its stockholders and its creditors can be forced to shoulder continued burdens in the reorganization, it must be shown that there is a reasonable likelihood of *successful* reorganization. Mere legislative enactments and hopes for success do not satisfy the burden placed upon the government:

> "The appellees suggest that we can take judicial notice of proposed legislative solutions for the northeast rail transportation crisis which at the time of argument were under active consideration in Congress and have since been enacted. They suggest, further, that such judicial notice can serve as a substitute for the findings required by the *Third Avenue* and *Jersey Central* rules. We do take judicial notice that legislative solutions were under active consideration and have now been enacted. We also take notice that it is highly likely that some form of rail transportation system, publicly or privately owned, will almost certainly survive even

7. *In re Third Avenue Transit Corp.*, 198 F. 2d 703 (2d Cir. 1952).

8. *Central Railroad Co. of New Jersey v. Manufacturers Hanover Trust Co.*, 421 F. 2d 604 (3d Cir. 1970), *cert. denied*, 398 U. S. 949 (1970).

> if the present proceedings under § 77 are dismissed. But such judicial notice cannot serve to enlarge the power of the reorganization court and the ICC to subject the property of secured[9] creditors to a taking while, like Mr. Micawber, they wait for something to turn up. Congress, in devising a legislative solution, will be bound by the Fifth Amendment to pay the fair value of the Penn Central properties at the time any new rail transportation entity takes them. Any amount beyond that value, which would compensate secured creditors for the erosion which took place while the reorganization court and the ICC waited for a congressional solution [i.e., before the effective date of the congressional solution on January 2, 1974], would be a matter of legislative grace." *Columbus Options*, 494 F. 2d 282-3.

Judge Gibbons further recognized that the sorry state of Penn Central's finances already dictated a choice of either liquidation or compensation:

> "If as some of the reports filed by the trustees suggest, it is already clear that such a reorganization is not feasible, [footnote omitted] then this reorganization is already at the point where the erosion of the estate in deficit operations must cease and a liquidation alternative must be considered if the secured creditors or other interested parties insist upon such consideration." *Id.* at 283.

Likewise, the government defendants in this case cannot rely on their theory that so long as a "light at the end of the tunnel" exists, the public interest may then be permitted to outweigh the interests of the estate during the

9. Unsecured creditors and stockholders were not before the Court, *Columbus Option Appeals, supra* at n. 13.

interim. As the court held in *Columbus Options*, hopes cannot serve as a substitute for the findings required by the *Third Avenue* and *Jersey Central* rules. Judge Fullam very plainly outlined this principle in his opinion below:

> ". . . It must be assumed that USRA will strive diligently to comply with the Congressional directive to design both 'a financially self-sustaining rail service system' and a 'rail service system adequate to meet the rail transportation needs and service requirements of the region.' At present, no one knows whether these somewhat inconsistent goals can be achieved. Congress itself has recognized the uncertainty, by retaining the right to review the plan before it becomes effective. And, of course, even if the Final Plan is designed to show profitability on the basis of *pro forma* projections, there can be no assurance that actual results will live up to the forecasts.
>
> "The point is, not that these uncertainties can or should be eliminated, but that all risks—of the possibility of designing a profitable system, of ultimate profitability, and of interim losses while the hypotheses are explored—are imposed upon the debtors and their creditors, who are to be irretrievably committed to the project in advance, no matter how it works out.
>
> ". . . [I]t is impossible to avoid the conclusion that, before the burden of further interim erosion can constitutionally be imposed upon the railroad and its creditors, there must be greater assurance of a constitutionally acceptable end result than is provided by this statute." *Connecticut General, supra,* concurring opinion (J. A. pp. 79-80).

The government purports to see a "light at the end of the tunnel". The fact is, however, that there simply is no

reasonable prospect of successful reorganization under the Act as is required by the cases before continued loss operations can be imposed upon the Penn Central estate over appellees' objections. The Penn Central Reorganization Court has found that there is no possibility of an income-based reorganization within a reasonable time pursuant to Section 77 of the Bankruptcy Act (J. A. pp. 84-103). Conrail will not be significantly different from the present Penn Central System, as the four small bankrupt lines in addition to Penn Central will constitute no more than 10% of Conrail's trackage and revenues.[10] The same basic problems which ultimately led to the Penn Central's collapse and which still exist today will be faced by a Conrail System, 90% of which is composed of Penn Central. No demonstration has been made as to the likelihood of Conrail's viability, nor can a reasonable expectancy of such future viability be shown at this point in time, particularly in light of the withdrawal of the Erie Lackawanna and the Boston & Maine from the proposed system. Large scale abandonments of present lines are unlikely given the already mounting opposition to such widespread rationalization by local interests.[11] Furthermore, large scale abandonments may not be a total cure all for the inherent deficiencies of a Conrail system (made up primarily of Penn Central trackage) given the conclusion reached by the Wyer, Dick Studies that a 15,000 mile Penn Central system is not viable. The Act provides no means to achieve improved manpower productivity by eliminating unnecessary employees or to alter the inflexible labor rules which have

10. The Reading, the Lehigh Valley, The Central Railroad of New Jersey, and the Ann Arbor account for only about 11% of present trackage and 8% of present revenue for miles. DOT Report, Vol. I, p. 7.

11. *See* Rail Services Planning Office Evaluation of the DOT Report, at 9-10.

plagued Penn Central throughout its existence. The Act looks towards the continuation of passenger services without making any attempt to deal with the present conflict between freight and passenger services within the existing Penn Central System. As such, it ignores one of the basic viability requirements established by the Trustees, that is, that the reorganized rail system deal in passenger service only to the extent that such service impose no burden whatsoever upon freight operations. Finally, there has been no showing made that Conrail will be able to satisfy the Trustees' viability conditions concerning traffic and revenues. As a result of the Act's failure to provide adequate funds for rehabilitating and modernizing Penn Central's plant, it is unlikely that these operating levels can possibly be delivered for a Penn Central system, let alone for a Conrail system which incorporates four additional bankrupt lines.

There is a lesson to be learned from the New Haven reorganization. In dismissing the government's contention that investors in a railroad could be forced to "run such risk of erosion of their investment as is necessary in the public interest in order to preserve railroad service," *Columbus Options, supra* at 279, the Third Circuit dwelt upon where the limitations of such a principle might lie:

> "Neither appellee suggests the precise contours of what is claimed to be the new constitutional rule. The government, however, points out that in the New Haven reorganization erosion of the interests of secured creditors amounted to $70 million while the railroad was waiting to be included in the Penn Central merger. *See New Haven Inclusion Cases,* 399 U. S. at 490. We know, with the benefit of hindsight, that since 1968 the New Haven bondholders have fared even worse. If the results of the New Haven reorganization determine the

constitutional limitations of a reorganization court's power to subject mortgaged assets to erosion, there may be no limitation whatsoever." *Id.* at 279.

Unlike the situation present in the *New Haven Inclusion Cases*, Penn Central Company has objected to the reorganization plan originally proposed by the Trustees and has requested termination of the rail operations of Penn Central Transportation Company (J. A. pp. 377-381). In the *New Haven* situation, not only did the creditors not actively oppose the reorganization plan but they all urged inclusion of the New Haven into the Penn Central. Here, to the contrary, all creditor and shareholder interests oppose continued operation of the railroad. In addition, in the *New Haven*, the reorganization court had supervision and control over the reorganization plan—inclusion of the New Haven into the Penn Central. It determined the date, feasibility and value of the inclusion. Here, of course, the Reorganization Court has no power or control whatsoever over the procedures established by the Act.

The erosion here has progressed, very simply, too far and for too long. During the period of Penn Central's reorganization prior to the effective date of the Act, rail operations resulted in losses of $851 million.[12] From the inception of the Act until May, 1974, Penn Central's net losses exceeded $97 million.[13] If the processes of the Act are allowed to continue through the end of 1975, then the rail operations forced by the Regional Rail Reorganization Act will result in a further projected loss of $443.1 million.[14]

12. Reorganization Court's Memorandum and Order No. 1543, 120 day decision (May 2, 1974), (J. A. pp. 84-103), Finding of Facts Nos. 1, 4 (J. A. pp. 89-90).

13. Trustee's Statement of Revenues and Expenses of Penn Central for May, 1974.

14. Reorganization Court's Memorandum and Order No. 1543, *supra*, Finding of Facts Nos. 24, 25 (J. A. pp. 98-99). Additionally, it should be noted that U. S. R. A. has recently requested of Congress

Visions of ultimate success can be nothing more than sheer speculation, and sheer speculation cannot be used to counteract the reality of the unbearable financial burdens placed on the plaintiffs here. We have here a far different situation than faced the courts in the *New Haven Inclusion Cases, supra, Continental Illinois Nat. Bank & T. Co. v. Chicago, Rock Island & Pacific Ry. Co.*, 294 U. S. 648 (1935); *Reconstruction Finance Corp. v. Denver & Rio Grande Western Ry. Co.*, 328 U. S. 495 (1946). There the courts were presented with Plans of Reorganization. The very real possibility existed that the railroads could be reorganized. Under those circumstances, the Courts held that the losses of the creditors incurred during the reasonable time in which it took for the Plans to be drafted need not be constitutionally remedied. Here, the reorganization court has found there is no possibility for a reorganization pursuant to Section 77 and *no one has presented any evidence whatever that Conrail has any reasonable likelihood of success while significant evidence has been presented that it is doomed to failure.*[15] In the Reorganization Court, the testimony of John W. Ingraham, vice president of First National City Bank was introduced into evidence.[16] That evidence shows that Conrail would likely run out of cash three to five years after conveyance of the rail properties to it and that from 1975-1982 Conrail would not be able to obtain adequate financing from the private sector and there is no likelihood that dividends will be paid on Conrail stock. Mr. Ingraham concluded that the value of Conrail stock would be at most $160 million. The

14. (Cont'd.)
a four month delay for the issuance of preliminary and final system plans. Therefore, interim losses will continue an additional four months.

15. See discussion, *supra*, pp. 26-27.

16. Document No. 7598 in the reorganization court proceedings.

Ingraham testimony stands unchallenged and uncontradicted.

There is no question but that the Act requires continued operation of the Penn Central pending implementation of the Final System Plan. The very purpose of the Act is to transfer to Conrail the rail properties of the affected railroads. Section 304(f) provides that after the enactment of the Act, "no railroad in reorganization may discontinue service or abandon any line of railroad other than in accordance with the provisions of this Act" unless it is authorized to do so by USRA and no reasonable opposition has been made by any affected region or locale. USRA has not authorized any abandonments and in response to requests by the Penn Central Trustees for approval of abandonments, USRA stated that it had established no procedures to deal with such requests. (See Joint Documentary Submissions 64, 65.) It would be most surprising if USRA, whose goal is to achieve a Final System Plan for all railroads in reorganization in the area, would agree to the abandonment of integral portions of the system. It is most certainly clear that the states and local regions affected by the Act will continue to oppose all abandonments as they have in the past. The Act means what it says—rail operations *must* be continued.

This Act, while compelling continued rail operations during the period before the Final System Plan is implemented, fails utterly to provide adequate compensation for such a taking. The sole provisions of the Act which provide for the payment of monies to the subject railroads, Sections 213 and 215, are wholly inadequate to compensate the estates for the burdens caused by mandated interim operations. Section 213 limits the authority of the Secretary of Transportation to authorize funds for rail services during the implementation period of $85 million. This amount is clearly insufficient to protect the bankrupt railroads from the considerable injury that they will suffer from interim operations and as the lower court pointed out, the full statutory authorization has not been appropriated and there is no agreement as to the nature of these payments (J. A. 31-32). Section 215 merely provides funds for the acquisition, maintenance or improvement of rail properties and specifically releases Conrail from any obligation to compensate a railroad for that portion of the value of the transferred properties which is attributable to such acquisition, maintenance, or improvement. The lower court, after reviewing these provisions in conjunction with the history of Penn Central losses, both past and continuing, concluded:

> "It becomes quickly apparent that the limited amounts of these funds—available to railroads in reorganization in the region—have not been specifically designated to meet challenges of unconstitutional erosion." (J. A. p. 31)

The Court, therefore, held that Section 303 violated the constitutional rights of the Appellees for the specific reason that it, being "the only provision of the Act pertaining to valuation of the railroad estate, [failed] to provide a remedy for any unconstitutional erosion." (J. A. p. 53).

No matter how serious the rail crisis might be, no matter how important continued rail operations might be, the method that Congress has chosen here, the Regional Rail Reorganization Act, does blatant violence to the Constitution. Judge Fullam made that abundantly clear in his 180 day decision pursuant to § 207(b) of the Act:

> "The issue is not whether governmental action may properly be taken to avoid such dislocations, but rather whether the method selected by Congress, the RRRA, is a constitutional method of achieving that legitimate public goal. In short, the question is whether the gov-

ernment can avoid such disruptions by imposing the costs and risks of a possible solution upon the Debtor's estate. Support for an affirmative answer to that question is to be found, if at all, in the concept that the privilege of a government-protected railroad monopoly gives rise to a residual claim in the public for continuation of railroad operations, to wit, the notion of 'common carrier responsibility' which finds statutory expression in § 1(18) of the Interstate Commerce Act.

"The legitimacy of 'common carrier responsibility' is, of course, not in question. But the duration of that responsibility is. Stated briefly, the issue is whether the government may treat a common carrier whose government-sponsored monopoly is no longer profitable, as if it remained profitable.

"In the so-called Granger case, *Munn v. Illinois*, 94 U. S. 113 (1876), the Supreme Court articulated the 'public interest' theory upon which economic regulation was based for almost 60 years:

> 'Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to the use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to control.' 94 U. S. at 126.

"In the case of railroads, the right to withdraw is not unqualified. State legislatures early authorized regulatory agencies to control the abandonment and termination of services of rail carriers. Since railroads operate under government-created monopolies, that extension of regulatory power was both logical and lawful, if the carrier's total operations were profitable. Charington, *The Regulation of Railroad Abandonments*, 17-25 (Harv. 1948).

"However, when a carrier's operations are not profitable, it is unconstitutional to require their continuance. *Brooks-Scanlon Co. v. Railroad Commission*, 251 U. S. 396 (1920); *Bullock v. Florida ex rel. Railroad Commission*, 254 U. S. 513 (1921); *Mississippi R. R. Commission v. Mobile & Ohio R. R. Co.*, 244 U. S. 388 (1917). Enactment of the Transportation Act of 1920, which contains what is now § 1(18) of the Interstate Commerce Act, did not alter this constitutional doctrine. *Railroad Commission v. Eastern Texas R. R. Co.*, 264 U. S. 79 (1924). The Supreme Court has recently recognized the continuing validity of those cases, in the *New Haven Inclusion* case, *supra* (399 U. S. at 491). Recent decisions in the Third Circuit, *In the Matter of Penn Central Transportation Co.*, 49 F. 2d 270 (3d Cir. 1974) (Columbus options case), and in the First Circuit, *In Re Boston & Maine Corp.*, 484 F. 2d 369 (1st Cir. 1973), as well as the decision in *Connecticut General, supra*, are all to the same effect. Indeed, the government does not dispute, as an abstract principle of constitutional law, the doctrine that there may be a point beyond which a railroad cannot constitutionally be required to continue to provide service.

"It appears to be the government's contention that in the present case the Debtor can be forced to continue rail operations, not indefinitely, perhaps, but at least for a substantial further period, without regard to whether the accruing administration expenses reduce the value of the estate less than its present liquidation

value. The monopoly rationale of railroad regulation, as noted above, does not support that argument. And I am unable to perceive any basis in the general concept of police power for upholding that result.

"The government may, of course, preclude uses of property which are harmful to the public, and even render valueless under certain circumstances private property without compensation in order to obviate the harm, *e.g., Miller v. Schoene,* 276 U. S. 272 (1928) (destruction of cedar trees spreading disease to apple orchards). But, except for the monopoly rationale, there is no authority for affirmatively requiring uncompensated continuation of a use of property merely because cessation of that use would be detrimental to the public. Indeed, there are constitutional limits to governmental restrictions of the use of property, when such restrictions are confiscatory. *Pennsylvania Coal Co. v. Mahon,* 260 U. S. 393."

In re Penn Central Transportation Company (Bky. No. 70-347, July 2, 1974), Memorandum Decision (J. A. pp. 143-146). (Footnotes omitted).

While the public interest in continued rail services is important, this Court has recognized the supremacy of the Constitution to such public interest:

"The constitutional protection afforded by the Bill of Rights and the Fourteenth Amendment were designed to protect fundamental rights, not only of the majority but of minorities as well, even against the will of the majority. The effort to accommodate community sentiment or the wishes of a majority of voters, although usually valid and desirable, cannot justify abandonment of our Constitution." *Reitman v. Mulkey,* 387 U. S. 369, 87 S. Ct. 1627, 18 L. Ed. 2d 830 (1967); *Lucas*

v. Forty-Fourth General Assembly, 377 U. S. 713, 84 S. Ct. 1459, 12 L. Ed. 2d 632 (1964).

As the Reorganization Court has clearly recognized, the creditors and shareholders have acted with utmost patience and deference through these proceedings:

"It is easy to picture that present controversy as a dispute between grasping creditors, on the one hand, and the public interest, on the other. But that simplistic picture is entirely inaccurate. In the first place, the creditors and stockholders of the Penn Central Transportation Company have exhibited commendable patience and restraint in supporting the continued operation of the railroad during reorganization, at a cost of nearly $1 billion. More importantly, the immediate impact of continued loss operations is being absorbed by state and local taxing authorities, and by pre-bankruptcy personal injury claimants, whose judgments have been held in abeyance for more than four years, and cannot be paid until all senior claimants are taken care of in a plan of reorganization. Whatever may be said of trade creditors and investors, surely the local taxing authorities and personal injury claimants cannot be said to have made an investment decision of any kind or to have extended credit voluntarily to the railroad.

"Among the 160,000-odd stockholders, and the upwards of 50,000 bondholders, I have no doubt that a significant portion do not readily conform to the image of sophisticated investors. And even if they were all established financial institutions, some mention should be made of the generally accepted view that our system of private enterprise can best be preserved if investor confidence

> is not unnecessarily jeopardized." *In re Penn Central Transportation Company,* (Bky. No. 70-347, July 21, 1974), Memorandum Decision (J. A. 148-149).

The creditors and stockholders cannot suffer their constitutional rights to be violated. On innumerable occasions, this Court has reaffirmed the basic principle that a private party cannot be compelled to bear a burden which, in all justice and fairness, should be borne by the public. *United States v. Pewee Coal Co.,* 341 U. S. 114 (1951). See *Armstrong v. United States,* 364 U. S. 40, 49 (1960); *Louisville Joint Stock Land Bank v. Radford,* 295 U. S. 555, 602 (1935).

The Fifth Amendment to the Constitution prohibits the government from taking property without paying just compensation. Yet, this Act mandates the taking of plaintiffs' property without any compensation during the indefinite period of preparation of a Final System Plan. Therefore, the Act in this respect must fall.

II. The Final Taking of Property Pursuant to the Act Violates Penn Central Company's Fifth Amendment Rights.

A majority of the three-judge court held that the issue of whether the final conveyance of property mandated by the Act takes plaintiff's property without adequate compensation in violation of the Fifth Amendment was not ripe for adjudication. Judge Fullam dissented stating that the issue was ripe. Penn Central Company concurs in Judge Fullam's reasoning and contends that the Order of the three-judge court below enjoining certification of the Final System Plan should be sustained for the reason that the final taking of property pursuant to the Act violates the Fifth Amendment.

A. The Compulsory Conveyance Features of the Act Are Ripe for Adjudication.

The final taking effectuated by the Act presents constitutional issues that are not only ripe for adjudication at this time but issues that must be confronted by the court. The "ripeness" doctrine is a judicial rule conceived as a means of insuring that the court's jurisdiction would not extend beyond "cases" and "controversies." As one of a number of judge-made rules that serve as stepping stones to the availability of the courts' decisional process, "ripeness" is a word of art conceived to insure that the parties to the litigation and the issues subject to adjudication are presented in a clean, concise and well-defined context. Where declaratory relief is sought the question of whether a "controversy" is ripe is forever in the forefront of issues to be decided before the substantive merits of the claim are adjudicated.

In determining whether a "controversy" is judicially cognizable at the time it is presented, this Court in *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth,* 300 U. S. 227, 240-241 (1937), has set out what have become the standard general guidelines:

> "A 'controversy' in this sense must be one that is appropriate for judicial determination. Osborn v. Bank of United States, 9 Wheat. 738, 819, 6 L. Ed. 204. A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. United States S. S. Co., 253 U. S. 113, 116, 40 S. Ct. 448, 449, 64 L. Ed. 808. The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. South Spring Gold Co. v. Amador Gold Co., 145 U. S. 300, 301, 12 S. Ct. 921, 36

L. Ed. 712; Fairchild v. Hughes, 258 U. S. 126, 129, 42 S. Ct. 274, 275, 66 L. Ed. 499; Massachusetts v. Mellon, 262 U. S. 447, 487, 488, 43 S. Ct. 597, 601, 67 L. Ed. 1078. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, and distinguished from an opinion advising what the law would be upon a hypothetical state of facts. . . . Where there is such a concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged, the judicial function may be appropriately exercised . . ."

The application of these standards to concrete factual settings has, however, proved to be a difficult task for subsequent courts. As the Supreme Court frankly recognized in *Maryland Casualty Co. v. Pacific Coal and Oil Co.*, 312 U. S. 270, 273 (1941):

"The difference between an abstract question and a 'controversy' contemplated by the Declaratory Judgment Act is necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy. Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment. See *Aetna Life Ins. Co. v. Haworth*, 300 U. S. 227, 239-242, 57 S. Ct. 461, 463, 464, 81 L. Ed. 617, 108 A. L. R. 1000."

The Supreme Court in *Poe v. Ullman*, 367 U. S. 497, 508-9 (1961), has provided guidance in attempting to discern whether an actual "controversy" is present:

"Justiciability is of course not a legal concept with a fixed content or susceptible of scientific verification. Its utilization is the resultant of many subtle pressures, including the appropriateness of the issues for decision by this Court and the actual hardship to the litigants of denying them the relief sought."

As Justice Douglas observed in his concurrence in *Public Affairs Associates, Inc. v. Rickover*, 369 U. S. 111, 114-117 (1962):

"The requirements of a 'case' or 'controversy' and the propriety of the use of the declaratory judgment are at times closely enmeshed. In resolving those issues the Court has on the whole been niggardly in the exercise of its authority . . . At times the question of 'ripeness' of an issue for judicial review is brigaded with the appropriateness of declaratory relief . . . At other times the issue is said to be 'abstract' because of the lack of immediacy in the threatened enforcement of a law. Thus, a person must risk going to jail or losing his job to get relief . . . the list is not complete. But these cases illustrate the restrictive nature of the judge-made rules which have made the federal courts so inhospitable to litigation to vindicate private rights. At no time has the Court been wholly consistent; nor have I . . . But my maturing view is that *courts do law and justice a disservice when they close their doors to people who, though not in jail nor yet penalized, live under a regime of peril and insecurity. What are courts for, if not for removing clouds on title, as well as for adjudicating the rights of those against whom the law is aimed, though not immediately applied?* The approach we take today has often been used to abdicate the judicial function under resounding utterances con-

cerning the importance of judicial self-denial. It has also served to place undue emphasis under the clarity and precision of the questions presented." [Emphasis added]

The factual context in which the final taking mandated by the Rail Act is presented to the court heavily supports the conclusion that the taking effected by the Act presents a justiciable controversy that is ripe for adjudication. The Act sets out mandatory procedures which lead inexorably to the taking of plaintiff's property without provision for just compensation in violation of the Fifth Amendment. Section 206 establishes the guidelines for the Final System Plan which is then prepared and implemented by USRA (§ 202). In particular, § 206 provides that the Final System Plan will designate which rail properties will be transferred to Conrail (§ 206(e)(1)(A)), that the transfer of such properties will be in exchange for stock in Conrail (§ 206 (d)(1)) and will designate the value of rail properties to be transferred and the value of the securities to be received (§ 206(f)). There is little question and indeed the parties have stipulated herein that PCTC rail properties will in all likelihood be included in the Final System Plan.[17]

Under § 207 a two step procedure by which a railroad becomes subject to the transfer provisions contained in the Final System Plan is set out. Within 120 days after enactment the § 77 reorganization court determines whether the railroad is recognizable on an income basis (§ 207(b)). Penn Central has already been found not to be so reorganizable.[18] The next step, within 180 days of enactment, is another determination by the reorganization court that the railroad will be reorganized pursuant to the Act unless the

17. Stipulation of Plaintiff and Defendants as to Factual Matters (J. A. 370-371).

18. J. A. 84-103.

railroad is reorganizable on an income basis or the Act does not provide a process which is fair and equitable to the estate of Penn Central (207(b)).[19]

The reorganization of the railroad proceeds pursuant to the Act if the special court fails to find that the railroad should not be subject to the process of the Act. Under § 207(c) USRA must prepare a Final System Plan. That plan is then submitted to Congress where, in accordance with § 208(a), it is "deemed approved" at the end of 60 days unless affirmative action is taken by Congress formally disapproving the Plan. USRA is under a continuing duty to revise the Final System Plan in the event Congress does express its disapproval (§ 208(b)). Under § 208 the only judicial review of the Final System Plan provided for after Congressional approval under § 208, is of the value of the rail properties to be conveyed and the value of the consideration to be received. The rail properties must be conveyed by the Special Court under § 303(b). The Act does not allow for any discretion on the part of the Special Court. Indeed, the Act specifically precludes court action to restrain or enjoin any conveyance (§ 303(b)(2)). Section 303(c) allows, after the conveyance, review by the Special Court of the fairness and equity of the completed conveyances and provides the sole method by which the consideration for the conveyances can be altered in the event it is not found fair and equitable to the estate of the railroad.

Thus, the issue of the final taking of Penn Central's rail property when viewed in the context of the Act which

19. The finding by Judge Fullam, in *In the Matter of Penn Central Transportation Co.*, (Bky. No. 70-347), pursuant to Section 207(b), that the Act does not provide a process which would be fair and equitable to the Estate of Penn Central (J. A. 104-152) has been stayed pending the final determination of this issue by the Special Court pursuant to Section 207(b). It must be noted that the Act specifically prohibits any review of the decision entered by the Special Court (Section 207(b)).

effectuates that taking is undeniably a justiciable controversy. The Act is comprised of a series of steps which lead inexorably to the conveyance of the rail properties of Penn Central. It is clear from even a superficial reading of the Act that plaintiff has absolutely no choice with respect to the transfer and valuation of his properties.[20] The Final System Plan is formulated, approved and implemented without the consent of any creditor or stockholder interest. Indeed, these parties are entirely powerless to prevent the inevitable conveyance once the process of the Act has begun. The Act's attempt to substitute choice in the Court for choice in the owner fails to provide any such meaningful choice.[21] The only time before the conveyance of the rail property at which judicial review of the entire Act is possible is under § 207(b). It is at that point that the reorganization court determines whether the process of the Act is fair and equitable to the estate of the railroad. But, at this point, a court can make only highly conjectural determinations on the basis of a non-existent record. Later, after the conveyance has occurred, the Special Court, under § 303(c), is empowered to determine if the conveyance has been fair and equitable. But, at this point it is too late to prevent the conveyance. Thus, the attempt to provide for conveyances based on judicial decisions is wholly ineffectual. At the time when a court can make an effective decision it does not have the information available to make that decision meaningful, and when the information is available a decision by the court no longer has any real meaning. Thus, this is the only time when Penn Central Company's claim that the final taking is unconstitutional can be effectively and meaningfully heard. A decision three years after conveyance will be of litle help to anyone. The fact is that the process of the Act has already begun to operate and plaintiff's rights are now being effected.

20. Judge Fullam noted in his Section 207(b), 180 day opinion, "Under normal concepts of due process in the administrative field, one would expect to find some opportunity for obtaining and considering the views of the affected property owners in advance of such value determinations." (J. A. p. 135).

21. Judge Fullam recognized in his 180 day decision, *supra* at 12, that, "A more serious, or at least more noticeable, problem pursuant to the Final System Plan are mandated to occur in advance of any judicial scrutiny and in the absence of any judicial determination as to the fairness and equity of the proposed exchanges. Arguably, even this defect might be remedied if the Special Court were empowered to set aside the conveyances if it should find unfairness of inequity. But it is clear that the Act does not permit any such curative action by the Special Court. And finally, even this series of problems could perhaps be overlooked if the Special Court could, by some alternative means, see to it that the respective estates received the "constitutional minimum" due them from their properties. But it is entirely clear that the Special Court, upon finding that the transfers are less than fair and equitable, is limited to reallocating the securities specified in the Final System Plan and, if the result is still unfair or inequitable, to imposing a deficient judgment against Conrail." (J. A. pp. 136-137).

In *Pennsylvania v. West Virginia*, 262 U. S. 553 (1922) suits were brought to enjoin West Virginia from enforcing an act of its legislature which Pennsylvania and Ohio claimed would injuriously affect the supply of natural gas entering their states. The Court, in holding that the suits were not brought prematurely, discussed the factual context of the case:

> "*The second question is whether the suits were brought prematurely.* They were brought a few days after the West Virginia Act went into force. No order under it had been made by the Public Service Commission; nor had it been tested in actual practice. But this does not prove that the suits were premature. Of course they were not so, if it otherwise appeared that the Act certainly would operate as the complainant states apprehended it would. *One does not have to await the consummation of threatened injury to obtain preventive relief.* If the injury is certainly impending, that is enough.

> "Turning to the Act, we find that by its first section it lays on every pipe line company a positive duty—to the extent of the supply of gas produced in the state, whether produced by it or others—to satisfy the needs, whether for domestic, industrial or other use, of all intending consumers, whether old or new, who are willing to pay for the gas and want it for use within the section of the state in which it is produced, in that through which it is transported, or in that wherein it is supplied to others. This is a substantive provision, whose terms are both direct and certain, and to which immediate obedience is commanded. No order of the commission is required to give it precision or make it obligatory, and it leaves nothing to the discretion of those who are to enforce it. On the contrary, it prescribes a definite rule of conduct and in itself puts the rule in force. It imposes an unconditional and mandatory duty, as counsel for the state admit, and obviously is intended to enforce a preferred recognition and satisfaction of the needs of consumers within the state, present and prospective, regardless of the effect on the interstate stream or on consumers outside the state." 592-4 [emphasis added]

The stress put on the mandatory aspects of the act and the lack of discretion involved in implementing the act evidence the Court's concern, not with whether the potential injury was already consummated but rather, with the fact that the act was so structured that the threat of harm occasioned by its mere passage was enough to establish the "ripeness" of the controversy. There were contingencies that may have affected any injury to be sustained by the plaintiff but the Court did not find these persuasive in light of the "procedural, penal, and remedial provisions" of the act.

Again, in *Carter v. Carter Coal Co.*, 298 U. S. 238 (1936), the Court looked to the mandatory provisions of the statute to determine whether the issues were prematurely raised. In holding the suits "ripe" for adjudication the Court stated,

> "That the suits were not prematurely brought also is clear. Section 2 of the Act is mandatory in its requirement that the commission be appointed by the President. The provisions of Section 4 that the code be formulated and promulgated are equally mandatory. The so-called tax of 15% is definitely imposed, and its exaction certain to ensue." 298 U. S. at 287.

Although the suits were brought immediately after the effective date of the Act, although no commission had been appointed and no "tax" yet enacted, the suits were ripe for adjudication. The mandatory nature of the act made the threatened injury real enough to satisfy the requirements for a "case" or "controversy." The factual context of *Carter v. Carter Coal Co., supra,* is similar to the situation in which the instant issues are presented. There, the act was in response to a critical problem and enacted to, provide, *inter alia,* for the general welfare. The drastic solution to this crucial problem envisaged by the act, however, was not allowed to conflict with the constitution, ". . . for nothing is more certain than that beneficial aims, however great or well directed, can never serve in view of constitutional power." 298 at 291. These words apply with equal force here.

The decision in *Pierce v. Society of the Sisters of the Holy Name of Jesus and Mary,* 268 U. S. 510 (1925) provides further support for the proposition that the mandatory process of the Act makes the final taking issues ripe for adjudication. Suits were brought to enjoin the enforce-

ment of Oregon's Compulsory Education Act of 1922. Although the effective date of the Act was not until 1926, the Court held that:

> "The suits were not premature. The injury to appellees was present and very real, not a mere possibility in the remote future. If no relief had been possible prior to the effective date of the act, the injury would have become irreparable. Prevention of impending injury by unlawful action is a well recognized function of courts of equity." 268 U. S. at 536.

The mandatory nature of the act created the "present and very real" injury. The time lag between the enactment and effective date of the act was not seen as a material contingency destroying the "ripeness" of the controversy. The court was keenly sensitive to the injury to appellees that would result from the failure to hear the issue.

The mandatory process of this Act, leading inevitably to the ultimate taking, provides the requisite substantial controversy, between parties having adverse interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment. That there are certain contingencies that must occur prior to the consummation of the conveyance of the rail properties does not detract from the mandatory process of the Act nor transform the ripe issues into prematurely raised issues. It is inherent in the nature of the remedies of declaratory judgments and injunctions that the injury has not yet become finalized. Rather, the purpose of these remedies is to keep the threat of injury from becoming real. In *Swift and Co. v. United States,* 276 U. S. 311 (1928), Justice Brandies, in response to the argument that the Court lacked jurisdiction because there was no case of controversy cautioned that:

> "The argument ignores the fact that a suit for an injunction deals primarily, not with past violations, but with threatened future ones; and that an injunction may issue to prevent future wrong, although no right has yet been violated." 276 U. S. at 326.

See also *Izaak Walton League of America v. St. Clair,* 313 F. Supp. 1312, 1315 (D. Minn. 1970); *Delaney v. Carter Oil Co.,* 174 F. 2d 314, 317 (10th Cir. 1949); *A. S. Abell Co. v. Chell,* 412 F. 2d 712 (4th Cir. 1969); *Pennsylvania Casualty Co. v. Upchurch,* 139 F. 2d 892 (5th Cir. 1943); *Seguros Tepeyac, S. A. Compania Mexicana v. Jernigan,* 410 F. 2d 718 (5th Cir. 1969).

In *American Machine and Metals v. DeBothezat Impeller Co.,* 166 F. 2d 535 (2nd Cir. 1948), declaratory relief was sought defining the legal relationship of the parties in the event the plaintiff gave notice of termination of its contract with the defendant. In granting the declaratory relief the court discussed the existence of contingencies and their affect on the presence of an actual "controversy" and the right to declaratory relief:

> "As the Supreme Court said in Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U. S. 270, 273, 61 S. Ct. 510, 85 L. Ed. 826, the difference between an abstract question and a 'controversy' is one of degree. If notice of termination had been given, the defendant apparently concedes that there might be an actual controversy, although even after termination it would still be optional with the plaintiff whether to continue the business and an adverse decision would probably induce him not to continue. Before termination, the controversy is one step further removed from actuality but not so far removed as to present only an abstract question, in our opinion. Once the notice of termina-

> tion is given, it is beyond recall; the dispute between the parties concerns the right of the plaintiff to continue business if that contingency happens. Where there is an actual controversy over contingent rights, a declaratory judgment may nevertheless be granted. Pennsylvania Casualty Co. v. Upchurch, 5 Cir., 139 F. 2d 892, 894; Franklin Life Ins. Co. v. Johnson, 10 Cir. 157 F. 2d 653, 658; Sigal v. Wise, 114 Conn. 297, 158 A. 891, 892, 893; Borchard, Declaratory Judgments, pp. 422-3." at 536

The presence of contingencies will not, therefore, bar declaratory relief as a matter of course. The nature of the contingencies must be closely scrutinized to determine whether they transform an actual controversy ripe for adjudication into a premature claim. In his decision below Judge Aldisert for the majority focused on three contingencies that, in his estimation, rendered the final taking issues premature. The second and third of these contingencies, delivery of the Final System Plan to Congress (§ 208(a)) and the actual conveyance pursuant to the order of the Special Court § 303(b) are merely time gaps that in no way detract from the ripeness of the issues. As Judge Fullam pointed out in his opinion, the submission and approval of a Final System Plan is inevitable and the Special Court has no discretion whatsoever in ordering the conveyance.[22] Thus, these contingencies are even less relevant to the ripeness of the final taking issues than were the contingencies present in *A. S. Abell Co., supra; Pennsylvania Casualty Co., supra;* and *American Machine and Metals, supra.* These contingencies may result in a time delay but they do not affect the inevitable taking mandated by the Act.

22. Opinion of Judge Fullam, (J. A. pp. 57-58).

The first contingency cited by Judge Aldisert, that action by the reorganization court under § 207(b) may prevent a conveyance from taking place, actually supports the conclusion that the final taking issues are ripe. Pursuant to § 207(b) the reorganization court must determine whether the Act, "provide[s] a *process* which would be fair and equitable to the estate of the railroad in reorganization . . ." [Emphasis added] Such a determination necessarily requires an assessment of the entire Act, that is, all its procedures and most importantly the provisions regarding the conveyancing of rail properties to Conrail.[23] As Judge Fullam forcefully pointed out in his decision in *Connecticut General:*

> "Under § 207(b), the Reorganization Court will have to consider at least some of the cluster of discrete issues concerning the ultimate conveyance provisions of the Act, including some of the constitutional issues raised by these cases. This is so because the Reorganization Court must consider the RRRA in its entirety in order to ascertain whether the process is fair and equitable to the estates. Moreover, it is highly improbable that a Reorganization Court could successfully reject the statute as unfair or inequitable under § 207(b) for reasons of less than constitutional magnitude. Indeed, the government's position at the June 10 hearing in the Reorganization Court was that nothing short of unconstitutionality would justify rejection of the Act under § 207(b)." (J. A. pp. 58-59).

Thus, the final taking issues must be determined at this moment. The inevitability and immediacy of this deter-

23. Indeed Judge Fullam stated in his 180 day decision that the final taking issues must be considered at this point . . ." [I] see no way to avoid it in the present litigation, where an evaluation of the fairness and equity of the RRRA is mandated." (J. A. p. 140).

mination renders the final taking issues ripe for adjudication before this court.

The contingencies that are present in the Act are, therefore, not contingencies at all. They are merely stumbling blocks on the path to the inevitable taking mandated by the Act. They cannot serve to render the constitutional issues raised by the process of the Act premature. The decisions cited by the majority do not dictate the conclusion that the final taking issues are premature. Read together, *Communist Party of United States v. Subversive Activities Control Board*, 367 U. S. 1 (1961), and *Albertson v. Subversive Activities Board*, 382 U. S. 70 (1965), establish a continuum along which a controversy proceeds from abstraction to ripeness. In *Communist Party*, the controversy was still at the hypothetical stage because of various abstract possibilities. In holding the issues premature, the Court recognized that the privilege was asserted on behalf of *unnamed* officers, that the Party might choose to register and thus the duty of those officers would never arise, that it was unknown whether the officers would claim the privilege and, if so, whether the Attorney General would honor it. Thus, the number and voluntary nature of these contingencies precluded there being a precise factual citing for the resolution of the issues. An overriding factor in the Court's conclusion was the fact that any disallowance of the claim of privilege in the context of the Act "may raise novel and difficult questions as to the reach of the Fifth Amendment." In *Albertson*, the court held that plaintiffs did not have to await prosecution for failure to register to have their constitutional claims adjudicated. Here, the Act is before the Court. There are no voluntary contingencies that stand between plaintiffs and the inevitable injury visited by the Act. Thus, the final taking issues presented are clearly further along the continuum than in *Communist Party*. Here, as in *Albertson*, the plaintiffs need not wait

until the unconstitutional conveyances are consummated before litigating their claims.

The final taking issues are, thus, ripe for adjudication by the court at this time. This conclusion is required by the factual context in which the issues are raised. The mandatory process of the Act itself creates the ripeness of these issues. The lack of discretion on the part of any future court in evaluating the constitutionality of the conveyances coupled with the involuntary nature of the transfers buttress this conclusion.

B. The Act Ultimately Results in a Taking of Appellee's Property Within the Meaning of the Fifth Amendment.

There can be little doubt that Penn Central Company's property will be "taken" under the Act as that term is used in the Fifth Amendment to the Constitution of the United States. As explained in detail at pp. 40-41, 48-49 *supra*, the Act mandates the involuntary transfer of rail properties to Conrail. Without its consent, Penn Central Company's shares of Penn Central Transportation Company will be confiscated and it will receive Conrail securities in return.

Clearly, transfer of the rail properties of Penn Central to Conrail effects a taking of the property of Penn Central Company, the sole shareholder of Penn Central Transportation Company and an unsecured creditor. If a substantial interference with the use and possession of property constitutes a taking, *United States v. Cousby, supra; United States v. General Motors Corporation*, 323 U. S. 373, 378 (1945); *Pennsylvania Coal Company v. Mahon*, 360 U. S. 393 (1922); *Eyerabide v. United States*, 345 F. 2d 565 (Ct. of Cl. 1965), it follows that the Act's mandatory

transfer of Appellee's rail properties constitutes a taking within the meaning of the Fifth Amendment.

C. The Method and Procedure of Taking Prescribed by the Act Is Unconstitutional.

The Fifth Amendment to the Constitution of the United States proscribes the taking of "private property . . . for public use without just compensation." The fundamental importance of this constitutional right has long been recognized:

> "Indeed, in a free government almost all other rights would become utterly worthless if the government possessed an uncontrollable power over the private fortune of every citizen. One of the fundamental objects of every good government must be the due administration of justice; and how vain it would be to speak of such an administration, when all property is subject to the will or caprice of the legislature and the rulers." Story, *Commentaries on the Constitution of the United States,* Volume 2 § 1790 at p. 570.

This Court has in numerous cases applied the Fifth Amendment's guarantee of full and adequate compensation for property taken by the government for public use. *Almota Farmers Elevator and Warehouse Co. v. United States,* 409 U. S. 470 (1973); *United States v. Miller,* 317 U. S. 369 (1943); *Olson v. United States,* 292 U. S. 246 (1934); *Joslin Manufacturing Co. v. Providence,* 262 U. S. 668 (1923). Although it was perhaps with exemplary motivation, Congress in this Act has circumvented the Fifth Amendment's prohibition against uncompensated taking and has denied to the judiciary its proper constitutional function of determining the amount of compensation to be paid.

1. The Act Violates the Fifth Amendment in That It Does Not Provide for Payment in Legal Tender and Limits the Amount to Be Paid.

The Act specifically provides that USRA is authorized to issue bonds, debentures, trust certificates, securities or other obligations up to $1,500,000,000 value. Section 210(b). Of this amount, up to $1,000,000,000 may be issued to Conrail. Section 210(b). Because Section 210(b) of the Act requires Conrail to utilize at least $500,000,000 for rehabilitation and modernization of the rail properties, Conrail, therefore, will have a maximum of $500,000,000 to use in issuing securities in payment for acquired rail properties.[24] Section 206(d) makes it clear that the confiscation of rail properties be compensated in the form of securities of Conrail. Thus, both the Act unambiguously proscribes compensation in the form of legal tender and substitutes payment of securities in the newly created Conrail.

The rule that payment for property taken by the government for public use must be in the form of money is almost as old as the Constitution itself. In *Vanhorne's Lessee v. Dorrance,* 2 Dall. 304, 313 (Cir. Ct., Pa. Dist. 1795) Justices Paterson and Peters stated:

> ". . . No just compensation can be made except in money. Money is a common standard, by comparison with which the value of any thing may be ascertained. It is not only a sign which represents the respective values of commodities, but it is a universal medium, easily portable, liable to little variation, and readily exchanged for any kind of property. Compensation is a recompense in value, a *quid pro quo,* and must be in money . . ."

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24. It must be noted that this $500 million will be paid in exchange for the rail properties not just of Penn Central but of seven other railroads affected by the Act.

As recently as last year, in *Almota Farmers Elevator & Warehouse Co. v. United States,* 409 U. S. 470 (1973), this court restated the rule that compensation must be the monetary equivalent for the taken property:

> "The Fifth Amendment provides that private property shall not be taken for public use without 'just compensation.' And 'just compensation' means the *full monetary* equivalent of property taken. The owner is to be put in the same position *monetarily* as he would have occupied if his property had not been taken." 409 at 794.

See also *United States v. Reynolds,* 397 U. S. 14 (1970); *United States v. Miller,* 317 U. S. 369 (1943).

The Act is therefore constitutionally deficient because compensation is to be in Conrail securities and not in legal tender. However, the Act suffers from the further constitutional deficiency that it limits the amount which may be used in connection with the acquisition of rail properties. In *Monongahela Navigation Co. v. United States,* 148 U. S. 312 (1893) a federal statute was held unconstitutional which limited the amount payable for property taken by the government. The Court addressed the issue of the compensation required by the Constitution:

> "The noun 'compensation', standing by itself, carries the idea of an equivalent. . . . And this is made emphatic by the adjective 'just'. There can, in view of the combination of those two words, be no doubt that *the compensation must be a full and perfect equivalent for the property taken.* . . . This excludes the taking into account as an element in the compensation any supposed benefit that the owner may receive in common with all from the public uses to which is private property is appropriated, and leaves it to stand as a declaration that *no private property shall be appropriated for public uses unless a full and exact equivalent for it be returned to the owner.*" 148 U. S. at 326 [emphasis added]

As shown above, the Act limits the amount of money available to Conrail and USRA for use in creating the securities to be paid as compensation. Clearly, this limitation denies to appellee its constitutional right to assurance of full compensation before its property is taken. For this reason alone the Act should be declared unconstitutional. *United States v. Reynolds,* 397 U. S. 14 (1970); *United States v. Miller,* 317 U. S. 369 (1943); *Olson v. United States,* 392 U. S. 246 (1934); *Miller v. United States,* 57 F. 2d 424 (D. C. Cir. 1932).

Although Section 303(c)(2) permits the Special Court to issue deficiency judgments against Conrail if it determines that the securities which are deposited with the Court in exchange for rail properties do not meet constitutionally mandated levels of minimum compensation, such deficiency judgments would in no way serve to meet the just compensation requirements of the Fifth Amendment. The inherent constitutional deficiencies in this scheme are obvious: any reallocation of securities would be subject to the upper limit of the amount of securities which the Corporation as a whole could issue; the issuance of additional Conrail securities would dilute the value of the securities already issued and would in no way result in a curing of the deficiency; and a deficiency judgment brought against Conrail would result in an overall decrease in the net worth of Conrail and a resultant decrease in the value of all of the securities which had been or were to be issued in the future by Conrail. Nor is there any assurance that a deficiency judgment against Conrail would be collectible; nor indeed

that this type of deficiency judgment would not itself plunge Conrail into the Bankruptcy Courts.

All the evidence presented to the Reorganization Court and the three-judge court below demonstrates that the rail assets of Penn Central alone are far in excess of the $500 million available to be paid for the rail assets of all railroads affected by the Act. The Day and Zimmerman Study conducted for the trustees estimated the value of the assets of Penn Central as of December 31, 1970. The study found that the value of the assets assuming continued rail use was $13.5 billion. The value of the assets assuming liquidation for non-rail use was projected at between $1.99 billion and $3.5 billion (Joint Documentary Submission No. 40). While this study includes all assets of Penn Central, not merely those used for rail operations, it can only be concluded that the $500 million available for payment to all railroads is nowhere near sufficient to adequately compensate Penn Central for its rail operations. Indeed this is precisely what the Reorganization Court found in its 180 day decision (J. A. p. 137).

2. The Act Is Unconstitutional Because It Proscribes the Judiciary's Constitutional Function to Determine the Amount Payable as Compensation.

The measure of compensation payable for property taken by the government for public use is:

> "That equivalent is the market value of the property at the time of the taking contemporaneously paid in money." *Olson v. United States, supra,* at 255.

It is established that the determination of the amount to be paid as compensation is a judicial function:

> "By this legislation, Congress seems to have assumed the right to determine what shall be the measure of compensation. *But this is a judicial, and not a legislative, question.* The legislature may determine what private property is needed for public purposes; that is a question of a political and legislative character. But when the taking has been ordered, then the question of compensation is judicial. *It does not rest with the public, taking the property, through Congress or the legislature, its representative, to say what compensation shall be paid or even what shall be the rule of compensation. The constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry.*" *Monongahela Navigation Co. v. United States, supra,* at 327 [emphasis added]

In the area of the Fifth Amendment's protection of the individual's property rights, just as in the case of other basic constitutional issues, it is the courts that are invested with the authority and duty to determine what constitutes constitutional exercises of power. *United States v. 9.94 Acres of Land in City of Charlestown,* 51 F. Supp. 478 (E. D. S. C. 1973); *United States v. 677.50 Acres of Land in Marion County, Kansas,* 239 F. Supp. 318 (D. Kan. 1965); *United States v. 60, 000 Square Feet of Land and 8-Story Hotel Thereon, Known as Oakland Hotel,* 53 F. Supp. 767 (N. D. Cal. 1943); *United States v. 2715.98 Acres of Land, More or Less, in Jefferson County, Washington,* 44 F. Supp. 683 (W. D. Wash. 1942).

The Act violates this basic constitutional principle by granting to Congress the power to determine the amount and type of compensation to be paid. Congress has defined the type of compensation to be paid in § 303(c) of the Act by providing that Penn Central Company, creditor and stockholder of the debtor, will receive securities of unknown value. In § 210 of the Act, Congress has limited the amount

available for use in connection with compensation. The Act, therefore, usurps the judiciary's exclusive duty to apply and protect the constitutional right to "just" compensation. *Monongahela Navigation Co. v. United States*, 148 U. S. 312 (1893).

III. The Tucker Act Remedy.

A. The Act's Language and Legislative History Show That Congress Intended That a Tucker Act Remedy Is Not Available; It Certainly Is Not Adequate.

The Governmental defendants argue that whether or not there is a taking, the Act is constitutional because a Tucker Act remedy is available to claimants of the estate. Plaintiffs contend and the court below concluded from an examination of the Act that a Tucker Act remedy is lacking:

> "We are persuaded that the legislative history supports the conclusion that Congress intended that financial obligations be limited to the express terms of the Act. Article I, Section 9, Clause 7 provides that no money shall be drawn from the Treasury of the United States except in consequence of an appropriation made by law. Section 213(b), *supra*, and Section 214 entitled 'Authorization for Appropriations' place an express ceiling on expenditures. Section 210 describes the maximum obligational authority of the Association, and the authorization for appropriation is limited to 'such amounts as are necessary to discharge the obligations of the United States arising *under this section*.' [Emphasis supplied] Judicial review is delineated with specificity in Sections 209(a) and 303 with no mention of the Court of Claims." Opinion of three-judge court (J. A. pp. 50-51).

In reaching its decision, the court found the following colloquy between two of the House Managers of the bill to be especially significant:

> "*Mr.* [Dan] *Kuykendall.* 'Mr. Speaker, I would like to ask the gentleman from Washington one point, and that is the matter of the deficiency judgment. There was a lot of colloquy in the original debate which expressed fears that the Federal Court had the key to the Treasury.
>
> " 'Will the gentleman give us his interpretation of the guarantees we have to keep that from happening in the court proceedings?'
>
> "*Mr.* [Brock] *Adams.* 'Mr. Speaker, *there is a definite limitation on the total amount that can be authorized under this bill. Any amounts that go beyond that, or the shifting of the way in which it is spent, is to be approved by an Act of Congress, to be signed by the president.* . . . [I]t was the clear intent of the managers that any amount other than common stock [of Conrail] was to be at the lowest possible limit to meet the constitutional guarantees.'
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> • • •
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> "*Mr. Kuykendall.* 'There is no way the Federal Court may assess the taxpayers or this Congress on the judgments of the creditors, is that correct?'
>
> "*Mr. Adams.* 'The gentleman is correct.'
>
> "*Mr. Kuykendall.* 'There is no way they can assess the Congress for the money?'
>
> "*Mr. Adams.* 'The gentleman is correct.' " 119 Cong. Rec. H. 11876 (1973); cited in three-judge court opinion (J. A. pp. 49-50). [Emphasis supplied].

The discussion between Representatives Kuykendall and Adams clearly expresses the Congressional intent that a Tucker Act remedy be precluded by the RRRA. The Act was passed with the specific understanding by its supporters that there is "*no way* the Federal Court may assess the taxpayers or this Congress on the judgments of the creditors." *Id.* (J. A. at p. 50). [Emphasis supplied]. This expression is not a mere opinion that the Act does not result in a taking; only the courts can decide that question. Rather, it is an explanation of the fact that the Act, as written, does not envision a remedy in the Court of Claims.

It would seem clear that the Court of Claims was not intended, under the Act, as a forum to adjudicate any matters arising thereunder. Section 209 specifically delineates the process of judicial review. No part of that process is delegated to the Court of Claims. Only the Special Court is permitted to make any determination as to the amount of any further compensation to which the Penn Central estate is constitutionally entitled. Section 303(c)(1)(A) directs the Special Court to find whether the terms of any conveyances are "fair and equitable" to the estate of the railroad. Presumably, this finding must include a determination whether the conveyance in a *broad* sense is fair and equitable; that determination must adequately consider the effects of interim erosion. If the Special Court finds that the transfers are indeed not fair and equitable, then it may either reallocate Conrail's securities among the railroads transferring their properties to Conrail, § 303(c)(2)(A), or order the transfer of other Conrail securities or USRA obligations, § 303(c)(2)(B). The Special Court is finally empowered to enter a deficiency judgment against Conrail if, by use of the first two alternatives, "the lack of fairness and equity *cannot be completely cured.*" § 303(c)(2)(C) [Emphasis supplied]. The absence of any further alternative indicates that the deficiency judgment against Conrail is intended to be the *complete cure* for any failings in the plan's method of compensation. No part is left for the Court of Claims to play; the *exclusive* appeal from any finding under § 303(c) is to the Supreme Court. § 303(d).

Senator Hartke cautioned his colleagues that if they *failed* to enact the RRRA, then a Court of Claims remedy would indeed be available:

> "If we did nothing while continuing to mandate rail service, there is a distinct possibility in view of the prior act of Congress that a number of these people would make a claim against the Government which could be sustained in the Court of Claims. . . .
>
> We met on this matter in February. We had an emergency session of Congress in which we forced them to continue to operate, even though they were in the bankruptcy court. I am not saying that as a matter of law they have an absolute claim but I would be glad to represent them on a contingency fee basis if we do not pass this legislation. Even if it were a small contingency I could go ahead and get a fee that would probably be the biggest that any lawyer has ever gotten in the United States. The claim would be for relief under the due process clause of the Constitution which prohibits making a man continue to dissipate his estate through Government action.
>
> Reorganization is supposed to protect the estate from unconstitutional erosion. If you go in and force them to continue to operate any longer without taking legislative action, you have, in effect, taken property without due process." *Id.* at [23783-23784.]

Members of the House had expressed great fear as to whether the RRRA would jeopardize the public treasury:

> "*Mr. Skubitz.* Mr. Chairman, no one will deny that rail transportation in the Northeast must be maintained—however, I would be derelict in my responsibility as a committee member . . . if I did not add cautionary comments.
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> • • •
>
> "Mr. Chairman, the administration opposes this bill in its present form because of the mandatory transfer provisions in this act—and the labor protection title.
>
> "The administration argues that a mandatory taking constitutes a taking by eminent domain. Hence the question of fair market value cannot be determined by the Congress as this bill provides but is a matter for the courts to finally determine.
>
> "Our committee ignored the argument of the administration and restored [sic] to a constitutionally questionably legal vehicle by which the properties of bankrupt roads, and roads in reorganization, are to be molded into the new quasi-public Railroad Corporation, which the Congress would saddle upon the American taxpayer at costs that no one can fairly assess.
>
> "In one circumstance these properties may be held to be worth upward of $12 to $14 billion, in another circumstance it may be much less. No one knows, no one can be sure.
>
> "But whether $1 billion or $14 billion, the ultimate drain on the public purse will be great." *Id.* at 9739-9740 (1973).

Mr. Skubitz's concern for the likelihood that the bill would impose heavy burdens on the taxpayer was shared by Mr. Ruppe:

> "I think the taxpayers of this country are going to take a terrible beating when the final determination of values is made. It will likely run into billions of dollars." *Id.* at H. 9742 (1973).

The bill never would have passed without assurances that the taxpayers would not be so burdened. The assurances were explicit that this would not be the case under the provisions of the Act:

> "*Mr. Adams.* '[W]e have limited the amount of government loan guarantees that can be used for acquisition so that taxpayers are protected both by legislative history guided by the determination of the Court and by an absolute limit on the amount of government guaranteed loans that can be used." *Id.* at H. 9732 (1973).
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> • • •
>
> "*Mr. Adams.* There is a specific limitation in the final bill which says no more than $200 million of government loan guarantees can be used for acquisition in any event, so if the court in 5 to 10 years should come in with a higher value, the only judgment would be against this new corporation that is there." *Id.* at H. 9742.
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> • • •
>
> "*Mr. Shoup.* In my colloquy with the gentleman from the State of Washington (Mr. Adams), the gentleman had stated that the deficiency judgment provided for in Section 502 of the bill would be limited to $200 million for the purpose of acquiring rail assets. How-

ever, as the Court would not be able to permit a bankrupt railroad to be paid any less than the fair and equitable value of the rail assets with which they parted, it would have to either issue deficiency judgment against the corporation itself or require that the assets be returned to the bankrupt railroad. Because a large deficiency judgment against the new corporation might place such a heavy burden upon it as to prevent it from becoming viable the Congress could be called upon to authorize FNRA [now the USRA] to issue obligations beyond the limitation set in this bill in whatever amount would be required to make up that deficiency judgment. Therefore the $200 million limitation on the issuance of obligations by FNRA is not an absolute limitation on the amount of money the taxpayers may be called upon to finance this venture." *Id.* at H. 9742-9743.

It is important to note that Congress carefully insulated the public treasury from creditors of Conrail. A judgment can be had only against Conrail, not against the United States. If the deficiency judgment seriously weakens Conrail, then Congress has provided for increased obligational authority guaranteed by the government; Congress has not, however, provided for any monies to be paid directly to the creditors from the public coffers.

The final version of the Act omitted the specific $200 million dollar figure and instead provided for tighter Congressional control over monies available, requiring that any further obligational authority "shall be made by joint resolution *adopted by the Congress.*" § 210(b) [emphasis supplied]. The Conference Report described the change in terms of the flexibility that the government would now have:

"The conferees deleted a $200 million limitation on obligational authority [from H. R. 9142, § 609(a)] which could be used by the Corporation for acquisition of property. The conferees believed that the need for obligations for such purposes would be minimal, and the planners should have as much flexibility as possible." Conference Report on H. R. 9142, 119 Cong. Rec. H. 11868 (1973).

The change in the legislation reinforced Congress' intention to maintain complete and absolute control over the amount of money the taxpayers would pay for the Northeast rail reorganization. Furthermore, in § 206(i), Congress enacted that any arrangements in the Final System Plan for terms and conditions for securities to be issued by Conrail "shall not include any form of Federal guarantee of the value of the Corporation stock." *Id.* at H. 11867.

While it is apparent that Congress did contemplate that the Federal Treasury might indeed have to be further tapped, the contingency upon which that further funding would be based is the entry in the Special Court of a deficiency judgment against Conrail—not upon any judgment in the Court of Claims—and any monies from the treasury will go to support the obligational authority of USRA, not to satisfy the claims of the estate directly.

It is with this interpretation of the Act in mind that Representative Adams so confidently asserted that creditors could not have the power to open the door to the Federal Treasury. Against this background of clear legislative intent, the lower court correctly ruled that the Act precludes a Tucker Act remedy. The court forcefully dismissed the government's contention that the Act did not expressly repeal the Tucker Act:

"For this court to interpret the Act in a manner contrary to its explicit terms, contrary to the express representations of the bill's managers at the conference

committee discussions, and to construe this Act in a manner which will expose the United States Treasury to presently incalculable, but, in any event, substantially formidable claims would be a flagrant violation of the separation of powers doctrine. If we did this, the judiciary would truly have become the 'law-giver' for substantial federal appropriations; this in itself would raise serious constitutional problems.

"To accept the government defendants' contention would require judicial legislation on a grand, if not arrogant, scale. Justice Holmes told us 'I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions.' [*Southern Pacific Co. v. Jensen*, 244 U. S. 205, 221 (1917) (Holmes, J., dissenting)]. To read a Tucker Act remedy into the Act would be a movement of the mass and not simply the particulars. We simply lack such power." *Connecticut General, supra* (J. A. pp. 52-53).

Accordingly, the Court held that since the Act results in a taking and does not provide adequate assurances for just compensation, the Act is unconstitutional.

This Court's decision in *Hurley v. Kincaid*, 285 U. S. 95, 52 S. Ct. 267 (1932) is not relevant to the instant situation. There, the plaintiff "concede[d] that the act [was] valid." 285 U. S. at 103. Kincaid had no complaints, contractual or constitutional, against the law in question. Here, of course, Penn Central Company and the other plaintiffs have levelled substantial and serious charges against the Rail Act. Penn Central Company's complaint alleges *inter alia* that the Act violates the uniformity provision of Article I, Section 8 of the Constitution; violates procedural due process and Article III, Sections 1 and 2 circumscribing, limiting and denying to plaintiff access to the courts

and judicial review; illegally removes powers vested in the judicial branch to other branches of government; illegally delegates powers vested in Congress to other branches of government; and illegally and unconstitutionally limits the manner in which the rights of plaintiff are to be determined.[25]

Unlike *Hurley*, there is clearly no adequate remedy at law here. Congress has set limits on the amount of compensation to be paid. Congress has ordered that the compensation will be paid in the form of securities in violation of *Almota Farmers Elev. & Whse. Co. v. United States*, 409 U. S. 470 (1973). Congress has prohibited judicial access and review and has applied an unconstitutional non-uniform law to Penn Central. Certainly, the Court of Claims cannot remedy these violations of law. In addition, of course, any monies to be paid in satisfaction of a Court of Claims judgment must be appropriated by Congress. 28 U. S. C. § 2517. See also 31 U. S. C. § 724a. The same Congress that during the debates on the Act recoiled in horror at the idea of handing out hundreds of millions or billions of public dollars for the rail properties of Penn Central and the other lines will certainly not open the key to the Treasury in response to a judgment in the Court of Claims. Therefore, any monetary judgment in the Court of Claims would be illusory. Clearly then, the injunction entered by the lower court is the only manner in which plaintiff Penn Central Company's rights can be adequately protected.

B. The Subsequent Legislative History of the Act Reinforces the Conclusion That Congress Intended to Bar a Tucker Act Remedy.

Subsequent legislative history of the act further buttresses the fact that Congress never intended the consti-

25. *Penn Central Company v. Brinegar*, 74-1149, Complaint at J. A. 341-349. See paragraph 24, J. A. 346-348.

tutionality of the legislation to be saved by a Tucker Act remedy in the Court of Claims. On June 14, 1974, after oral argument before the three-judge court below but before Judge Fullam's 180-day decision, the House Subcommittee on Transportation and Aeronautics conducted oversight hearings on the RRRA. The main focus during the hearings was the deep concern with which members of the subcommittee viewed the government's erroneous representation before the three-judge court as to Congress' legislative intent under the Act:

> "MR. KUYKENDALL. Now we were most concerned when reading some small parts of this massive brief that concessions had been made toward a certain thing, and, that is, that the creditors, who owned the property that was to become part of the system, had the key to the Treasury." Oversight Hearings of the House Subcommittee on Transportation and Aeronautics (June 14, 1974) at 251.
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> • • •
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> "MR. DINGELL. . . . I believe the actions of the Department of Transportation and the Department of Justice, as of this point, are in the gravest error and constitute a clear misconstruction of the intentions of the Congress with regard to the Northeast Rail legislation and constitute what may properly even be charged as a potential throwaway, or giveaway of millions or perhaps even billions of dollars of the taxpayers' money in the clearest defiance of *the express intent of Congress as set forth in the reports, the debate and in the clear language of the legislation,* which we are presently scrutinizing in this gathering here today.

> ". . . I wish to reiterate my outrage in the situation which I see going on before us. I wish to state that, it is, again, in my view, the clearest and most extraordinary defiance of the clearly expressed intention of the Congress with the portent of perhaps millions or perhaps even billions of dollars of taxpayers' money being dissipated to persons who have no proper and rightful claim on it, either under the constitution or the law.
>
> "I think, for the Department of Justice, or the Department of Transportation to engage in the kind of brief that I have seen here before us today, essentially agreeing with the rape of the public Treasury, is a scandal of the greatest dimension, and I think it may necessarily fall upon this committee or one of our subcommittees to look into and to inquire into why this kind of extraordinary action has been taken in terms of *a total and clear misconstruction of the attitude of the Congress and the intention of the Congress* when we passed the legislation." *Id.* at 253-255 [Emphasis supplied]

Representative Dingell's expressions of dissatisfaction with the government's task before the lower court could not have been more adamant.

Congress never intended a Court of Claims remedy to be available. The only remedy that the Act provides for an inadequately compensated taking is a deficiency judgment against the new corporation under § 303(c)(2)(C):

> "MR. DINGELL. Then the ultimate remedy for inadequately compensated creditors or for inadequately compensated taking is a judgment against Conrail and not a judgment against the United States under the language of the legislation." *Id.* at 281.

Certain that those charged with defending the constitutionality of the Regional Rail Reorganization Act were deaf to the intent of Congress that no Tucker Act remedy is available here, Representative Brock Adams and 29 other Members of the Congress felt compelled to speak directly to the judiciary. In their *amici curiae* brief to the Special Court in the appellate proceeding subsequent to Judge Fullam's 180-day decision, the House of Representatives placed on the record its own interpretation of its own legislative intent:

> ". . . [T]he possibility of a deficiency judgment against the U. S. pursuant to the lawful process of this Act was specifically considered and rejected . . . If this court should decide at this time that a mechanism of a deficiency judgment against the United States under the Tucker Act is necessary to make this Act 'fair and equitable' to the estates, then the Act must fall since the legislative history and the language of the Act are clear that no deficiency judgment against the U. S. is authorized." Brief *amici curiae* United States Representatives before Special Court in *In the matter of Penn Central Transportation Co.* (Special Court Docket No. 74-8) at pp. 12-13.

These same Congressmen have expressed the same point in their *amici curiae* brief filed in this action.

The subsequent legislative history makes one thing perfectly clear—the government's contention that Congress intended the public treasury be available for any taking under the Act is a totally groundless contention, with not a single echo of congressional support for its implications. If the Act could have been interpreted to indeed provide for such a remedy, the House Managers of H. R. 9142 never would have brought the bill to the floor for a vote:

> "Mr. Dingell. . . . But I want to make it plain that the floor managers, and, Mr. Adams, Mr. Kuykendall and Mr. Staggers over in the House and other members, the language of the bill the Report clearly indicated there was no intention of imposing this kind of contingent liability upon the people with enactment of the Northeast legislation.
>
> ". . . I am simply saying that with that kind of contingency possible [i.e., a potential liability of $12 to $14 billion upon the taxpayers], every member of this committee would have had the clearest responsibility to our colleagues to say, 'Look, fellows, we are handling your legislation which has this kind of potential;' and certainly I, or Mr. Adams or Mr. Kuykendall or Mr. Shoup or any of us here, and Mr. Skubitz, would not have gone to the floor.
>
> "Mr. Skubitz. Will you yield?
>
> ". . . That is one point I called attention to on the floor.
>
> "Mr. Dingell. Certainly none of the rest of us would have presented it where we thought of further liability on the part of the taxpayers without the clearest kind of warning this was the potential contingency that lay in the bushes as some future peril to the people we serve." *Id.* at 290-292.

A Tucker Act remedy is not available to save the constitutionality of the RRRA. There is no footing amongst the legislative history and the provisions of the Act itself upon which this Court can base any other conclusion. To rule otherwise would be obvious error and would serve only to antagonize the Congress.

C. The Regional Rail Reorganization Act Provides a Specific Remedy and Therefore Excludes the General Tucker Act Remedy.

In the face of the exclusive judicial remedies provided by the Regional Rail Reorganization Act, Supreme Court precedents prevent this Court from resuscitating the Tucker Act for use in the Northeast rail reorganization. The statute is specific legislation; the Tucker Act is general—and as this Court has so often stated, "it is familiar law that a specific statute controls over a general one." *Bulova Watch Co. v. United States*, 365 U. S. 753, 758 (1961).

The government's argument for the availability of a Tucker Act remedy is not the first time a party has attempted to circumvent an express statutory scheme of compensation. In both *Feres v. United States*, 340 U. S. 135 (1950), and *Johnson v. United States Shipping Board Emergency Fleet Corp.*, 280 U. S. 320 (1930), the Supreme Court refused to allow the specific statutes to be emasculated by resort to general compensation legislation. In *Feres*, servicemen attempted to sue the government in negligence for injuries resulting from incidents occurring while they were on active duty in the armed forces. Although the Tort Claims Act does confer jurisdiction upon the district court over negligence claims against the United States, 28 U. S. C. § 1346(b), and provides that "The United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances," 28 U. S. C. § 2674, the Supreme Court noted that in more specific legislation, the Congress had expressly excluded recovery:

> "No federal law recognizes a recovery such as claimants seek. The Military Personnel Claims Act, 31 U. S. C. § 2236, now superseded by 28 U. S. C. § 2672, 28 U. S. C. A. § 2672, permitted recovery in some circumstances, but it specifically excluded claims of military personnel 'incident to their service'." *Feres v. United States, supra* at 158.

Moreover, Congress had provided more direct methods than the Tort Claims Act by which servicemen could claim compensation. The Court held that where such remedies existed, the servicemen could not resort to the Tort Claims Act:

> "This Court, in deciding claims for wrongs incident to service under the Tort Claims Act, cannot escape attributing some bearing upon it to enactments by Congress which provide systems of simple, certain, and uniform compensation for injuries or death of those in armed services. [citing 38 U. S. C. § 701; 38 U. S. C. § 718; 38 U. S. C. § 725; 38 U. S. C. § 731; 38 U. S. C. §§ 740, 741]. We might say that the claimant may (a) enjoy both types of recovery, or (b) elect which to pursue, thereby waiving the other, or (c) pursue both, crediting the larger liability with the proceeds of the smaller, or (d) that the compensation and pension remedy excludes the tort remedy. There is as much statutory authority for one as for another of these conclusions. If Congress had contemplated that this Tort Act would be held to apply in cases of this kind, it is difficult to see why it should have omitted any provisions to adjust these two types of remedy to each other. The absence of any such adjustment is persuasive that there was no awareness that the Act might be interpreted to permit recovery for injuries incident to military service." *Id.* at 158.

The applicability of the *Feres* holding to the case at bar is obvious. Congress provided that the specific remedy of the Penn Central estate under the Regional Rail Reorganization Act is, in the end, to obtain a deficiency judgment against Conrail. The Federal Treasury was to be protected from invasion—that principle flows from the fact that Congress made no attempt to reconcile the Regional Rail Reorganization Act with the Tucker Act, showing that "there was no awareness that the Act might be interpreted to permit recovery."

Twenty years earlier, the Supreme Court dealt with a similar situation involving the Tucker Act in *Johnson v. United States Shipping Board Emergency Fleet Corp., supra.* There the court found the remedies under the Suits in Admiralty Act, 46 U. S. C. § 741 et seq., to be exclusive. The Suits in Admiralty Act provides "a complete system of administration" encompassing "venue, service of process, rules of decision and procedure, rate of interest, and periods of limitation." *Johnson, supra,* 280 U. S. at 326. Likewise, the RRRRA provides a complete and *exclusive* system of administration here. The Tucker Act cannot possibly be available. As the Fifth Circuit has stated:

> "The Tucker Act is general in its nature, and must give way to special statutes covering the particular cases. The federal courts, other than the Supreme Court, do not derive their jurisdiction from the Constitution of the United States, but exercise only such powers as Congress, within constitutional limits, confers upon them. So long as it does not expand that jurisdiction beyond such limitations, the Congress may give, withhold or restrict that jurisdiction as it sees fit." *Cook v. United States,* 115 F. 2d 463, 464-465 (5th Cir. 1940).

The government's argument for the availability of the Tucker Act remedy here is groundless. It finds no support in the Regional Rail Reorganization Act itself nor in its legislative history. A decree by this Court that the remedy is indeed available despite the existence of this manifestly exclusive and specific legislation would be contrary to the clear weight of precedent.

An argument that the Act is unclear as to whether a Tucker Act remedy is available and therefore the constitutionality of the Act in this aspect should not be decided or should be upheld cannot stand. First, as pointed out above, the Act is clear by its terms and by its legislative history that a Tucker Act remedy is not available. In addition, the uncertainty itself as to whether there is a Court of Claims remedy is enough for the Court to declare the Act unconstitutional. See *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U. S. 579, 588, 72 S. Ct. 863, 865-866 (1952).

IV. The Act Is a Non-Uniform Law on the Subject of Bankruptcy and Is Therefore Unconstitutional.

A. Decision of the Three-Judge Court as to Uniformity.

Penn Central Company argued before the three-judge constitutional court that the Act violates Article I, Section 8 of the Constitution of the United States. Article I, Section 8 enumerates in detail those powers which are vested in the legislative branch. Clause 4 of Section 8 grants to Congress the authority "To establish uniform laws on the subject of bankruptcy throughout the United States."

The three-judge court held that the Act was not geographically uniform in its application and that it therefore violated the constitutional provision of uniformity. The Court went on to hold, however, that all of the provisions of the Act, save Section 207(b), could be upheld as an ex-

ercise of Congress' powers under the commerce clause even though they could not be upheld under the bankruptcy power. The Court found that Section 207(b) dealing with dismissal of Section 77 proceedings is an exercise solely of Congress' bankruptcy powers and since the Act was not uniform, is unconstitutionally defective. The Court, therefore concluded by holding:

> "That all parties are enjoined from enforcing, or taking any action to implement, so much of Section 207(b) of the Regional Rail Reorganization Act of 1973 as purports to require dismissal of pending proceedings for reorganization under Section 77 of the Bankruptcy Act.
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> • • •
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> "That so much of Section 207(b) of the Regional Rail Reorganization Act of 1973 as requires reorganization courts to dismiss pending proceedings under Section 77 of the Bankruptcy Act under the circumstances set forth in said Section 207(b) is null and void, as violative of Article I, Section 8, Clause 4 of the Constitution of the United States." Order of Court dated June 25, 1974 (J. A. pp. 82-83).

Appellee Penn Central Company concurs in the Court's decision that the Act is not geographically uniform and urges affirmance of its injunction of any implementation of Section 207(b). In addition, Penn Central Company contends that this geographical nonuniformity deficiency renders other sections of the Act similarly unconstitutional and that therefore the lower court's injunction prohibiting certification of a Final System Plan pursuant to Section 209(c) and prohibiting any action enforcing Section 304(f) can and should be sustained on this additional ground.

B. The Act Is Not a Uniform Law on the Subject of Bankruptcy.

1. The Act Fails This Court's Definition of Geographical Uniformity.

The Regional Rail Reorganization Act of 1973, from its very title through each of its provisions, purports to reorganize only certain railroads within a particular region of the country. Section 102 of the Act explicitly limits the scope of the Act to certain designated states. In its "Declaration of Policy," the Act states that:

> "Essential rail service in the midwest and northeast region of the United States is provided by railroads which are today insolvent and attempting to undergo reorganization under the Bankruptcy Act." § 101 (a)(1).

Section 101 continues throughout to address itself solely to the "midwest and northeast region" and declares, *inter alia*, that "the reorganization of railroads in *this region* into an economically viable system capable of providing adequate and efficient rail service to *the region* is central to the purposes of the Act." § 101(b)(2) [emphasis added]. Again, throughout § 206 of the Act, in which the contents of the Final System Plan is outlined, the Act purports to deal solely with "rail properties of railroads in reorganization in the region. . . ." For the purposes of the Act, § 102(13) defines region as:

> ". . . The States of Maine, New Hampshire, Vermont, Massachusetts, Connecticut, Rhode Island, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, and Illinois; the District of Columbia; and those portions of contiguous states in which are located rail

> properties owned or operated by railroads doing business primarily in the aforementioned jurisdictions . . ."

Railroads operating within the "region" are affected by the provisions of the Act; those operating outside of the specified region are excluded. It is clear, in light of every judicial decision on this question, that such limitations as to the applicability of the terms of the Act are totally inconsistent with the Constitutional requirement of uniformity.

The only limitation which the Constitution imposes upon the power of Congress to enact bankruptcy laws is that these laws be "uniform." *Louisville Joint Stock Bank v. Radford*, 295 U. S. 555 (1935); *Hanover National Bank v. Moyses*, 186 U. S. 181 (1902); *In re Reichert*, 13 F. Supp. 1 (W. D. Ky. 1936). And it is settled law that the requirement of "uniformity" is a geographic one. *Stellwagen v. Clum*, 245 U. S. 605 (1918); *Hanover National Bank v. Moyses*, 186 U. S.; *In re Chicago, R. I. & P. Ry. Co.*, 72 F. 2d 443 (7th Cir. 1934); *In re Baltimore & O. R. Co.*, 29 F. Supp. 608 (D. Md. 1939), *cert. denied*, 309 U. S. 654 (1940); *In re New York, N. H. & H. R. Co.*, 16 F. Supp. 504 (D. Conn. 1936); *In re Davis*, 13 F. Supp. 221 (E. D. N. Y. 1936). Federal bankruptcy laws have been held constitutional when they treat different classes of persons differently, so long as the distinctions between classes of persons are made on a rational basis and not on a geographic basis. This Court, in *Hanover National Bank v. Moyses, supra*, 186 U. S. at 188, has stated:

> "The laws passed on the subject [of bankruptcy] must, however, be uniform throughout the United States, but that uniformity is *geographical* and not personal." [Emphasis added]

This requirement of geographic uniformity has been followed, without exception, by those courts that have confronted this issue.

The federal courts have held that the requirement of geographic uniformity is not violated because a national bankruptcy law may be affected, either substantively or procedurally, by the provisions of state laws. *In Stellwagen v. Clum, supra*, the Court wrote:

> "Notwithstanding this requirement as to uniformity, the bankruptcy acts of Congress may recognize the laws of the state in certain particulars, although such recognition may lead to different results in different states. For example, the Bankruptcy Act recognizes and enforces the laws of the state affecting power, exemptions, the validity of mortgages, priorities of payments, and the like. Such recognition in the application of state laws does not affect the constitutionality of the Bankruptcy Act, although in those particulars, the operation of the Act is not alike in all stages." *Id.* at 613.

It is clear, however, that provisions of the Regional Rail Reorganization Act themselves dictate that the Act would not apply uniformly. Uniformity is thereby compromised by the Act itself and not through the operation of state laws in connection with the implementation of the Act.

The Court in *In re Baltimore & Ohio Ry. Co.*, 29 F. Supp. 608 (D. Md. 1939) reiterated the requirement of geographic uniformity. That case involved the Chandler Act, 11 U. S. C. § 1200-1255, which provided temporary relief for certain railroads which found themselves in financially embarrassed straits. Constitutional attacks on the Chandler Act failed. The Supreme Court reasoned that,

although only a small number of railroads would be affected by the provisions of the Chandler Act at the time of its enactment and implementation, the Act nevertheless applied uniformly throughout the United States and that if, at some future point in time, other railroads did conform to the classifications established in the Act, they could then take advantage of its provisions.

> "The Act is, however, in general terms and applicable to all railroads conforming to the prescribed conditions of the state and applied uniformly in that respect through the United States." 29 F. Supp. at 621.

Unlike the Chandler Act, the 1973 Act is not uniform throughout the United States. Its geographic application is severely limited and the timetable for implementation which it prescribes forecloses any possibility that other bankrupt railroads, even in the "region" as defined in the Act, may, at some future point in time, be included within its provisions.

The Courts took the opportunity further to refine the uniformity requirement in connection with the Frazier-Lemke Act, 11 U. S. C. § 203(s). Frazier-Lemke was designed to provide relief to farmers during the severe depression of the 1930's. It granted a three-year stay of all bankruptcy proceedings so that farmers, during this interim period and under the supervision of the courts, would have the opportunity to re-establish their financial stability. The Act was an emergency measure and was applied nationally. However, one section of the Act, § 203(s)(6), stated that:

> "If in the judgment of the Court, such emergency ceases to exist in its locality, then the court, in its discretion, may shorten the stay of proceedings herein provided for and proceed to liquidate the estate."

Thus, the possibility existed, under the provisions of Frazier-Lemke, that different courts might reach differing or inconsistent conclusions with regard to the extent of the emergency period within which the Act would be viable. Such action would have resulted in different applications of the Frazier-Lemke Act in various regions of the country.

A number of lower courts held that the Act, as a result of § 203(s)(6), was nonuniform and, therefore, unconstitutional. *See, e.g., U. S. National Bank of Omaha v. Pamp,* 83 F. 2d 493 (8th Cir. 1936); *Wright v. Vinton Branch of Mountain Trust Bank,* 85 F. 2d 973 (4th Cir. 1936). The Supreme Court granted *certiorari* and ruled that the Act was valid. *Wright v. Vinton Branch of Mountain Trust Bank,* 300 U. S. 440 (1937). The Court stated that any differences which would result in the application of the provisions of the Act as a result of § 203(s)(6) would be analogous to differences which resulted from the application of state law. The Court reasoned that such judicial judgments might be necessary given the particular circumstances which might exist in one area. However, such a finding would not be related to the presence or absence of emergency conditions in other areas of the country. And since the legislation itself was found to be *national in scope,* the Court held that it met the requirements of uniformity as required by the Constitution.

But the Regional Rail Reorganization Act is neither uniform nor national in its scope. Different or inconsistent applications of the provisions of the Act would not result from the existence of applicable state law or from the actions of various state tribunals, but would instead be the result of the specific provisions of the Act itself. Congress, by specifically limiting the application of the Act to a particular region of the nation, has clearly violated the uniformity provisions of Article I, Section 8, Clause 4 of the Constitution.

The government cannot seriously contend that the Act is uniform because it applies to all Class I railroads in reorganization and all such railroads are within the region. The Act relates only to railroads in reorganization in the region as defined. If a Class I railroad in California were to have entered reorganization, it is clear that that railroad would not be affected by the Act. See Act §§ 101(a)(1), (b)(2), 102(13). This Act, therefore, is quite different from the Chandler Act upheld in *In re Baltimore & Ohio Ry. Co., supra,* page 34. See Opinion of the Court (J. A. pp. 62-63).

2. This Non-Uniform Act Is a Law on the Subject of Bankruptcies and Penn Central Company Has Standing to Attack It.

No party to these proceedings has seriously questioned the fact that the Act is a law on the subject of bankruptcies.

A law on bankruptcy has been defined by the courts as a statute which provides for the benefit and relief of creditors and their debtors in cases in which the latter are unable or unwilling to pay their debts. *Campbell v. Allegheny Corporation,* 75 F. 2d 947 (4th Cir. 1935). More specifically, a bankruptcy law is one which contemplates: (1) the control and seizure of all of the debtor's property; (2) a distribution of the debtor's property among the creditors; and (3) the discharge of the debtor from further liability on existing debts.

The Supreme Court, in its discussion of early federal bankruptcy statutes, foresaw their primary purposes as being to ". . . relieve the honest debtor from the weight of oppressive indebtedness, and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes" and to provide "a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt." *Local Loan Co. v. Hunt,* 292 U. S. 234, 244 (1934).

It cannot be questioned that Section 77 of the Bankruptcy Act, 11 U. S. C. Section 205, which statute is utilized and has been employed by the courts in connection with all railroad reorganizations, is an act in bankruptcy. The history of Section 77 confirms the fact that the bankruptcy clause of the Constitution is the source of Congress' power to control railroad reorganizations and the courts have so ruled. *Continental Illinois National Bank & Trust Co. v. Chicago, R. I. & P. Ry. Co.,* 294 U. S. 648, 673, 675 (1934). Indeed, *Continental Illinois* specifically held that railroad reorganizations came within the ambit of powers conferred by the bankruptcy clause of the Constitution, *Id.* at 675, and five years later, in *Warren v. Palmer,* 310 U. S. 132, 137 (1940), the Court stated:

> "Railroad reorganization in bankruptcy is a field completely within the ambit of the bankruptcy powers of Congress."

This Act in large measure is a supplement to the all encompassing reorganization provisions of Section 77.

The Act purports to deal solely with rail properties of those railroads in reorganization which are the subject of the Act.[26] As a result, the remaining non-rail properties of the debtor railroads remain within the purview of Section 77 and must be reorganized, at some future time, under the

26. For example, the Final System Plan, as outlined in Section 206 of the Act, would designate only those "rail properties" which are to be transferred to the Consolidated Rail Corporation, or which are to be offered for sale or lease to other profitable railroads in the region or by regional transportation authorities. Indeed, throughout the Act, the text is careful to specify its intention to deal solely with rail properties of the debtor railroads. *See, e.g.,* Sections 101(a), (b); 202(b)(1), (2), (3), (5); 204(a); 205(d)(1), (3); 206; 207(b); 209(a), (c); 301(e); 302(a), (b), (c), (d); and 303.

provisions of Section 77. The Act purports at the same time to override inconsistent provisions of the Bankruptcy Act (§ 601(b)), and in various sections purports to characterize the processes of the RRRA as a form of "reorganization." Section 207(b). Section 209(b) provides:

> "The special court is authorized to exercise the powers of a district judge in any judicial district with respect to such proceedings and such powers shall include those of a reorganization court."

As the court below made clear, Penn Central Company, shareholder and creditors of PCTC, and the other creditors have standing to challenge this lack of geographical uniformity. See Opinion of three-judge court (J. A. p. 62). The estate of the Penn Central Transportation Company is being affected by application of this Act. Thus, the estate's creditors and shareholders are being similarly affected. These parties contend that this is an invalid non-uniform and hence unconstitutional statute being applied to affect their interests. This satisfies even the strictest definition of the standing requirement.

C. This Non-Uniform Law on the Subject of Bankruptcy Can Not Be Upheld Under the Commerce Clause.

Article I, Section 8, grants specific powers to Congress. Clause 4 permits Congress to enact "*uniform* laws on the subject of bankruptcies." Thus, the legislative branch goes beyond its constitutionally authorized power when it enacts a law on the subject of bankruptcies which is not uniform.

The fact that another Section of the Constitution might conceivably apply to this Act which does not contain such a uniformity qualification is irrelevant. Article I,

Section 8, Clause 4 applies and any requirements or qualifications contained therein must be complied with.

A remarkably similar case was before the Supreme Court in 1946. The issue before the Court in *Richfield Oil Corp. v. State Board of Equalization*, 329 U. S. 69, 67 S. Ct. 156 (1946) was whether a tax imposed on exports by the state of California violated Article I, Section 10, Clause 2 which provides in relevant part:

> "No state shall without the consent of the Congress, lay any Imports or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection laws. . . ."

The state contended that while the California statute might be faulty under Article I, Section 10, Clause 2, it could be sustained as valid under the Commerce Clause. This Court refused to even consider the possible validity of the statute under the Commerce Clause stating:

> "We do not pursue the inquiry as to the validity of the tax under the Commerce Clause. For we are of the view that whatever might be the result of that inquiry, the tax is unconstitutional under Article I, Section 10, Clause 2." 329 U. S. 69 at 75, 67 S. Ct. 156 at 159.

Justice Douglas went on to state that while the courts have read a "discriminatory qualification" into the Commerce Clause, such a similar qualification could not be read into the Import-Export Clause. The Court continued:

> "But the two clauses, though complementary, serve different ends. And the limitations of one cannot be read into the other." 329 U. S. 69 at 76, 67 S. Ct. 156 at 160.

As the Court concluded on this matter:

> " 'In expounding the Constitution of the United States, every word must have its due force, and appropriate meaning; for it is evident from the whole instrument that no word was unnecessarily used, or needlessly added. The many discussions which have taken place upon the construction of the Constitution, have proved the correctness of this proposition; and shares the foresight of the illustrious men who framed it. Every word appears to have been weighed with the utmost deliberation, and its force and effect to have been fully understood. No word in the instrument, therefore, can be reflected as superfluous or unmeaning;' We cannot therefore, read the prohibition against 'any' tax on exports as containing an implied qualification." 329 U. S. 69 at 77-78, 67 S. Ct. 156 at 161.

Similarly here, the word "uniform" cannot be read out of the Constitution.

It is a rudimentary fact of legal construction that specific terms prevail over general terms contained in the same or another statute without regard to priority of enactment. *Townsend v. Little,* 109 U. S. 504, 512, 3 S. Ct. 357, 362 (1883); *Ginsberg & Sons Inc. v. Popkin,* 285 U. S. 204, 208, 52 S. Ct. 322, 323 (1932); *Fourco Glass Co. v. Transmirra Products Corp.,* 353 U. S. 222, 228-229, 77 S. Ct. 787, 791-792 (1957). Thus while the Commerce Clause obviously has some relationship to a bankruptcy, the requirements of Article I, Section 8, Clause 4 dealing specifically with bankruptcies must be controlling here. As the Court in *In re Sink,* 27 F. 2d 361 (W. D. Va. 1928) stated:

> "A general and uniform statute which deals with or in terms governs one material feature of bankruptcies, must, *ex vi termini,* be both internally and in intent a law on the subject of bankruptcies." 27 F. 2d at 361.

Therefore, the three-judge court's decision enjoining implementation and effectuation of the Final System Plan can and should be sustained for the additional reason that the Act as a whole violates Article I, Section 8, Clause 4.

D. Other Sections of the Act in Addition to 207(b) Are Derived From Congress' Bankruptcy Powers.

Even if this Court accepts the holding below that only those sections of the Act which can be said to be based solely on Congress' bankruptcy power and not commerce power are unconstitutional, it is clear that more than Section 207(b) are based solely on the bankruptcy powers. While various provisions of the Act are similar to parts of § 77 which is admittedly uniform, the provisions of the Act make significant changes in the § 77 procedures and safeguards.

Section 303 of the Act which permits conveyance free and clear of liens does not contain the procedural safeguards of § 77 mandating that the Trustees of the estate determine that sales are in the best interest of the estate and that the plan of reorganization is fair and equitable. See also Sections 206-209, 303-304 which fail to provide the similar safeguards and procedures found in § 77.

Those sections of the Act, therefore, that change the provisions of § 77 must have been promulgated under Congress' bankruptcy powers. Therefore, these sections are unconstitutional as being non-uniform.

For this additional reason, the lower court's order forbidding certification of a Final System Plan can be sustained.

CONCLUSION.

For the reasons stated above, appellee Penn Central Company requests that the Order of the three-judge court dated June 25, 1974, enjoining the United States Railway Association from certifying a Final System Plan pursuant to Section 209(c) of the Act, enjoining defendants from taking any action to enforce the provisions of Section 304(f) of the Act, enjoining all parties from enforcing or implementing portions of Section 207(b), declaring Section 303 of the Act null and void, declaring Section 304(f) of the Act null and void and declaring portions of Section 207(b) null and void be affirmed.

Respectfully submitted,

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